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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-771

LEO HURT,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

S. ALLEN EARLY, JR.
RALPH H. RICHARDSON
Attorney for Petitioner
810 Buhl Building
Detroit, Michigan 48226
Phone: (313) 963-6093

Interstate Brief & Record Co., 1615 Abbott St., Detroit, Michigan 48216
962-8745

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Leo Hurt, by and through his attorneys Ralph H. Richardson and S. Allen Early, Jr., petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming his Conviction on one count of conspiracy to violate 21 USC 846 (manufacture, distribution and possession of heroin and cocaine) and on sixteen substantive counts of the above crime, (21 USC 841 (a) (1)) all but one of which were based on an aiding and abetting theory (18 USC 2) derived from the *Pinkerton* sentencing rule.

OPINION BELOW

(Unreported, set forth in full as Appendix C, hereto.)

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was filed on October 8, 1976. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTIONS PRESENTED

I.

Should the application of the *Pinkerton v United States* sentencing rule holding that mere membership in a conspiracy is equivalent to aiding and abetting all substantive crimes committed by all co-conspirators, be restricted to defendants who have provided some direct facilitation to the member actually committing the substantive offense charged?

A. In the alternative, should the legally invalid and disfavored *Pinkerton* holding be overruled in accordance with the view of the ALI Model Penal Code and the National Commission for the Reform of Federal Criminal Laws?

II.

Is ineffective assistance of counsel demonstrated where two attorneys represented over twenty defendants in a conspiracy trial, Petitioner was indigent and only peripherally involved, yet no motion for severance was made to avoid transference of guilt?

STATEMENT OF THE CASE

On January 4, 1972, Petitioner Leo Hurt, Jr. and sixteen others were charged in a sixteen-count indictment. The first count charged the seventeen defendants and numerous unindicted co-conspirators with a single conspiracy to manufacture, distribute and possess heroin and cocaine, in violation of 21 USC §846.

The remaining fifteen counts charge all the defendants as principals or aiders and abettors, in violation of 18 USC §2 and 21 USC § 841 (a) (1), with various substantive acts of possession, manufacture and distribution of narcotics.

Petitioner Hurt, while being charged in each of the separate substantive counts, was, according to the proofs, actually involved in only one substantive count personally: possession of 0.268 grams (a "sample") as charged in Count 7 of the indictment.

On June 6, 1973, two trials commenced without a jury, 15 defendants in this case and 12 defendants in a companion case, all having waived their right to a jury. Five of the original defendants either moved or stipulated with the government to have their cases severed. No motion was made on behalf of Petitioner Hurt to sever his case or any of the counts.

The proofs adduced by the government at the trial with respect to Petitioner Hurt consisted basically of the following:

On November 15, 1971, pursuant to a telephone call placed by Hurt to the sellers of narcotics, co-defendant George Blair and one Ruth Ann Burt delivered narcotics to Hurt's residence and there sold to him a quantity of heroin and cocaine (not charged in the indictment).

A second delivery was made to Hurt on November 21, 1971, at his new residence by Blair and Burt from whom Hurt purchased a quantity of narcotics. This delivery was also pursuant to a telephone call from the sellers to Hurt (not charged in the indictment).

In addition, between November 15, 1971 and December 15, 1971, several phone calls between Hurt and the sellers' headquarters, at 19315 Hubbell Street, Detroit,

Michigan, were intercepted by government agents and recorded. These conversations, in the main, dealt with narcotics, the quality, price, amounts and defects thereof.

The final telephone call occurred on December 15, 1971, when Blair called Hurt from the Hubbell address and an argument ensued over Hurt's apparent lack of sufficient funds and Blair's insistence that Hurt could only buy for cash. Sometime later the same evening, Hurt went to the Hubbell Street address and then left, whereupon he was arrested outside several miles away and a search of his car turned up 0.268 grams of heroin. This was characterized as "a sample quantity," and there is no evidence as to where he obtained the sample or how it got in his car. Count 7 of the indictment refers to this substantive offense, and, as stated above, is the only count in the indictment where Hurt was personally involved.

In its findings and conclusions, filed under Rule 23(c) of the Federal Rules of Criminal Procedure, the Trial Court referred to many facts of association and activities of various defendants and co-conspirators prior to the period of the conspiracy charged in the indictment and described such activity "as pre-conspiracy foundational information." Hurt was never part of any such activity nor do the facts indicate Hurt's knowledge or association with any of the other defendants or co-conspirators except co-defendants George Blair and Eddie Jackson and witness Ruth Ann Burt.

No fact connects Hurt with any of the other fifteen substantive counts or activity relative thereto or suggests any knowledge on his part of the subject matter of said fifteen substantive counts.

Petitioner Hurt did not testify in his own behalf or present other evidence.

On July 22, 1974, the Trial Court found Hurt and ten others guilty of Counts One, Three, Four, Six, Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, Fourteen, Fifteen and Sixteen.

On October 18, 1974, Petitioner Hurt was sentenced to Fourteen concurrent terms of Seven years each and Fourteen Thousand Dollars as a committed fine, to be followed by a special parole term of three years.

Timely notice of appeal was filed with the Sixth Circuit on October 18, 1974 and extensions of time in which to file briefs were granted.

On October 8, 1976 the Sixth Circuit entered its judgment affirming Petitioner's Conviction. (App. B., infra).

On November 10, 1976 this Court granted an Order extending time to file this petition (App. D, infra).

REASONS FOR GRANTING THE WRIT

I.

The *Pinkerton* rule, exposing all co-conspirators to liability, as aiders and abettors, for all substantive offenses committed by any member of the conspiracy, should be limited in its scope to cases where the conspirator to be charged with this vicarious liability has some knowledge of the substantive offense and has personally facilitated that offense.

A. In the alternative, to accord with the "better view" expressed by the ALI Model Penal Code and the National Commission on Reform of Federal Criminal Laws, the *Pinkerton* case and doctrine should be overruled.

As part of the accoutrements of an over-expanded body of conspiracy law, a doctrine which has caused great consternation to and rejection by almost all enlightened commentators,[1] the so-called *Pinkerton* Rule[2] has been utilized against Petitioner to further penalize him as a conspiracy defendant.

The rule is especially obnoxious in that it is based on several erroneous assumptions regarding accomplice liability and conspiracy that were made by the majority in the principal case and consequently were proliferated as accepted doctrine.

Pinkerton has been read to hold that mere membership in a conspiracy is equivalent to aiding and abetting all crimes committed by any of its members in furtherance of its goals. Thus, each conspirator may be charged as a principal though he had nothing to do with those particular crimes and had no actual knowledge of their perpetration.

An examination of the case law which the Court cites to create this rule demonstrates it to be an instance of seizing upon inaccurate dicta to create a new and unintended criminal liability. As discussed below, each of the valid of these cases displays direct evidence of aiding and abetting as defined by statute. The same may be said of the principal case.

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[1] A.L.I. Model Penal Code §2.04(3) and Comment at 23 (Tent. Draft #1, 1953); 1 National Commission on Reform of Federal Criminal Laws, Working Papers 155-157 (1970); National Commission on the Reform of Federal Criminal Laws, Final Report — Proposed New Criminal Code §401 (1971).

[2] *Pinkerton* v *US*, 328 US 640 (1946).

The Court should not allow the continued propagation of such a different doctrine in the face of so little actual support. The following arguments are advanced in the hope that this Court will restrict the application of the rule to the bounds which its foundation dictates or overrule it entirely.

I. The Problem

It should be stated at the outset that Petitioner, by raising this issue, in no way admits the validity of the single conspiracy count as applied to him. Recognizing that he has nonetheless been convicted, on that charge, Petitioner raises this further issue.

The indictment in the present case charged one count of conspiracy to violate 21 USC §841 (a) (1) and 16 counts charging all the alleged co-conspirators with aiding and abetting the substantive offense of distribution of controlled substances in violation of the above statute.

It is clear the Petitioner had no part in any of the substantive offenses save that enumerated in Count VII. Yet, he was convicted as a principal through 18 USC §2[3]. The claim was that Petitioner "aided and abetted, counselled, commanded, induced and procured the distribution" of the controlled substances charged.

There was no evidence at the trial of anything resembling the requirement of 18 USC §2 to enable the prosecution to charge the Petitioner with those substantive offenses (consisting of several sales of narcotics by the Jackson organization to different persons).

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[3] 18 USC §2(a) "Whoever commits an offense against the U.S. or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

Those charges were predicated on the above-stated interpretation of the *Pinkerton* Rule.

It will be shown below that (1) there was no actual evidence of aiding the substantive offenses with which Petitioner was charged; (2) there is no basis to allow application of the rule so as to impose completely vicarious liability on those in Petitioner's position, and (3) the *Pinkerton* Rule, as so applied is poor law, contrary to legislative intent and discredited by the weight of legal authority.

These facts will point ineluctably to the conclusion that at the very least, the doctrine should be as limited as the cases cited to uphold it, and require some greater degree of contact with the actual perpetrator by the individual defendant than mere membership in the conspiracy. To bring it into line with statutory law and the "better view" of accomplice liability, the doctrine should be ignored in those cases where direct evidence of aiding and abetting beyond merely joining the conspiracy is lacking.

II. The Proofs — Aiding and Abetting

A. The Statutes

The statute under which Petitioner was convicted of the substantive offenses which he personally did not commit was, as previously stated, 18 USC §2. Its text is set forth in footnote 3.

The statute governing the substantive offense is 21 USC §841 (a)(1), which reads:

> "(a) except as authorized by this Chapter, it shall be unlawful for any person knowingly or intentionally —

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance;"

Thus, the evidence must show the elements of aiding and abetting the intentional distribution of the controlled substance charged.

B. The Elements of Aiding and Abetting

1. The Act

The requisite acts for aiding and abetting are delineated in the statute. However, this list (no doubt intended to be exhaustive as it describes these specific acts and none others) does not specify what will constitute the named acts in all fact situations. What is clear from the case law arising from the statute is that there must be some sort of active participation in some phase of the particular substantive offense charged.

> "Aiding and Abetting within this section providing that whoever aids or abets the commission of an offense against the United States is a principal *means to assist the perpetrator of the crime*." *White* v. *United States*, 336 F. 2nd 474 (1966); also see *United States* v. *Williams*, 71 S. Ct. 595 (1951) (Emphasis supplied.)
>
> "Aiding and Abetting is knowingly to participate in, that is purposely to give substantial assistance to another to help commit a crime," *United States* v. *Interstate Engineering Corporation*, 288 F.Supp. 402 (DCNH 1967).

It is equally clear that nowhere in the government's offering was there a scintilla of evidence of substantial assistance in the distributions set forth as the substantive

offenses. They were single sales to other purchasers, and in no way did Petitioner aid or encourage them in the sense of the statute and cases.

2. The Mental State

The requisite mental state again reflects the necessity for a more positive inducement to commit the substantive offense than bare conspiratorial relation. "One is guilty as an aider and abettor when he consciously shares in any criminal act", *U.S.* v. *Kramer*, 236 F. 2d 656 (CA 7, 1956); also see *U.S.* v. *Carangella*, 198 F. 2d 3, cert den. 73 S. Ct. 179 (CA 7, 1952). "In order to aid and abet the commission of a crime, it is necessary that the supposed aider and abettor act with knowledge that an offense is to be committed." *United States* v. *Turnipseed*, 272 F. 2d 106 (CA 7, 1959). However, "an undisclosed intention to render aid (or encouragement) will not suffice for it cannot encourage the principal in his commission of the crime." *Hicks* v. *U.S.*, 150 U.S. 442 (1893).

Thus, if Petitioner were aware of these specific purchases (and there is no evidence of that prior to December 15, 1971), it would not be enough to sustain conviction on aiding and abetting.

It cannot reasonably be claimed that Petitioner has evinced the intent to aid which is called for by the statute.

The aiding and abetting counts massed against the Petitioner were not based on the Petitioner's acts and intent fulfilling the elements of the crime. To reiterate, the ground upon which they have been charged is a misapplication of case law precedent to and incorporated in *Pinkerton* as the next section makes clear.

III. The Pinkerton Rule

In the principal case, Walter and Daniel Pinkerton were convicted for violations of the Internal Revenue Code. The indictment contained ten substantive counts and one conspiracy count. The jury found Walter guilty on nine of the substantive counts and on the conspiracy count. They found Daniel guilty on six of the substantive counts and on the conspiracy count. The substantive offenses were committed in furtherance of the conspiracy. The conspiracy itself contained only the two brothers *who, of course, planned and consulted directly with each other.* There was no evidence to show that Daniel participated directly in the commission of the substantive offenses upon which his conviction was sustained: "*Although there was evidence to show that these substantive offenses were, in fact, comitted by Walter in furtherance of the unlawful agreement* . . . between the brothers." *Pinkerton* v. *U.S., supra*, at 645. Apparently, Daniel had assisted in their planning.[4]

The question of Daniel's guilt for those offenses was submitted to the jury on the theory that each defendant could be found guilty of the substantive offenses if it were found at the time those offenses were committed the petitioners were parties to an unlawful conspiracy and the substantive offenses charged were in fact committed in furtherance of it. *Pinkerton, supra*, at 645.

The Court then advanced this argument in affirming the conviction:

> "We have here a continuous conspiracy. There is no evidence of the affirmative action on the part of Daniel, which is necessary to establish his withdrawal from it . . . and so long as the

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[4] A.L.I. Model Penal Code n.1 at 22.

partnership in crime continues, the partners act for each other when carrying it forward. It is settled that "an overt act of one partner may be the act of all without any new agreements specifically directed to that act," *U.S.* v. *Kissel*, 281 US 601, 608.

"Motive or intent may be proved by the acts or declarations of some of the conspirators in furtherance of the common objective, *Wiborg* v. *U.S.*, 163 U.S. 632, 657-658. A scheme to use the mails to defraud, which is joined in by more than one person, is a conspiracy, *Cochran* v. *U.S.*, 41 Fed. 2d 193, 199-200. Yet all members are responsible though only one did the mailing. *Cochran* v. *U.S.*, supra; *Mackett* v. *U.S.* 90 Fed. 2d 462-464; *Baker* v. *U.S.*, 115 Fed. 2d 533, 540; *Blue* v. *U.S.*, 138 F. 2d 351, 359. The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project", *Johnson* v. *U.S.*, 62 F 2d 32, 34.

"The criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in

crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy under §37 of the Criminal Code, 18 U.S.C. §88. If that can be supplied by the same act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense."

There are several misconstructions and misapplications in the Court's reasoning.

The Court makes reference to a "partnership" in crime extending vicarious liability to each "partner" for the others acts. This is an analogy to the civil liability common to partners.[5] But to apply this doctrine to develop totally vicarious criminal liability for the acts of co-conspirators, is unconscionable. Criminal law, unlike civil law, has its foundation in personal and individual guilt, the essence of which is causation,[6] and any doctrine of vicarious criminal liability is repugnant to common law concepts.[7] Forced analogies between the *remedial* principles of civil law and the *penal* provisions of criminal law have received specific Congressional disapproval.[8]

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[5] Note, "Vicarious Liability for Criminal Offenses of Co-Conspirators" 56 Yale L. J. 371-74 (1947).

[6] Sayre, "Criminal Responsibility for the Acts of Another" 43 Harv. L. Rev. 685, 719 (1930).

[7] id. at 702, et seq.

[8] Sen. Rep. No. 163, 72d Cong., 1st Sess. (1932)

Referring to the Court's analogy, one commentator has put the problem in this manner:

> "Quite another line of cases cited as authorities for the general rule espoused in the instant case (Pinkerton) are those in which conspiracy alone is charged; there being no question of substantive offenses at issue. In these cases, what is said about responsibility for the substantive crimes of fellow conspirators is purely obiter dicta. If the general rule announced in the instant decision seems to have had its inception in the statements made in such decisions, the principle having been culled from a general or ambiguous phraseology or given as corollary to statements that the act of one can be attributed to any other conspirator to constitute the overt act required by the conspiracy statute." (Note, 16 Fordham L. Rev., 280).

In making the bald assertion regarding the completely vicarious liability, the Court was unquestionably acting on less than persuasive authority. Equally inapposite is the Court's analogy regarding the attribution of one member's overt act to all co-conspirators.

Until *Pinkerton*, Federal courts had applied the "overt act" doctrine "only (1) to establish as the act of all members of the alleged conspiracy the overt act required by the Federal Conspiracy Statute, (2) to show the extent and duration of the conspiracy in relation to all the conspirators, or (3) as a rule of evidence to connect all the defendants with the crime charged.[9] Never was it used to establish the sort of liability *Pinkerton* contemplates and thus cannot be used as a solid basis for doing so.

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[9] n. 5 at 375.

Indeed, the only way the overt act analogy can be accorded any weight is through combination with the most erroneously applied analogy of the group, the aiding and abetting analogue which was used to equate conspiracy with that crime.

An impressive collection of decisions and text writers in general are relied upon by the majority of the Court in the principal case to substantiate this rule. Examination of them, however, reveals an interesting pattern of less positive authority.

The vast majority are cases which, upon examination, prove to contain evidence of *definite participation in the substantive offenses by all parties convicted of both the conspiracy and the substantive offenses*, although this fact is not often alluded to in the opinions. The conspirators convicted in these decisions are burdened with the trappings of accomplices. Without consciously acknowledging it — because it is implicit in the decision — the courts convict of the substantive crimes those who are manifestly accomplices.[10] The furthest any of the

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[10] Chambers v. United States, 237 Fed. 513, 524 (C.A. 8th, 1916) wherein there is evidence that both conspirators had knowledge of the substantive offenses. It is interesting to note that the opinion in this case cites Hume v. United States, 118 Fed. 689 (C.A. 5th, 1902) and Burton v. United States, 142 Fed. 57 (C.A. 8th, 1906) in both of which there was no conspiracy indictment but where the defendants, described as conspirators, were convicted as accomplices. United States v. Bender, 60 F(2d) 56, 57 (C.A. 2d, 1932) in which there is evidence of knowledge and active agreement by the defendants and where the court said " . . . the jury could find from the evidence that both appellants caused the letters to be mailed." Ader v. United States, 284 Fed. 13 (C.A. 7th, 1922); United States v. Weber, 114 Fed. 950 (W.D. Va. 1902) wherein there was evidence of knowledge. Profitt v. United States, 264 Fed. 299 (C.A. 9th, 1920) wherein there was evidence of knowledge and acquiescense in the substantive offense.

cases go is to find one to be a conspirator who has merely knowledge, or constructive knowledge, of the crimes of his co-conspirator, and despite many statements to the contrary there are no cases in which a bare conspirator, lacking even knowledge of the crimes of his fellow schemers, is found guilty of their offenses. In this category are found most of the cases cited by the majority in the principal case.[11] Furthermore, those few cases in which the defendants, convicted of a substantive crime of fellow conspirators, could possibly be described

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[11] Cochran v. United States, 41 F.(2d) 193, 199, 200 (C.A. 8th, 1930) (evidence of aiding and abetting was so substantial that the conspiracy count was dismissed and conviction obtained against all but one as principals. When the conspiracy count was dismissed the defendant who had not participated in the substantive offenses was granted a new trial); Blanton v. United States, 213 Fed. 320, 325 (C.A. 8th, 1914) (wherein there was no indictment for conspiracy and defendants were convicted as accomplices although described as conspirators in the opinion); Baker v. United States, 115 F. (2d) 532 (C.A. 9th, 1932) (there was no conspiracy indictment but a conviction as principals on evidence of "aiding and abetting", although defendants were described as conspirators); Collins v. United States, 20 F. (2d) 574 (C.A. 8th, 1927) (defendant convicted as principal on evidence of aiding and abetting); Boyd v. United States, 142 U.S. 450 (1892) (the defendants are described as conspirators but were present at the scene of the crime); United States v. Lancaster, 44 Fed. 896 (W.D. Ga. 1892) (two of the defendants were found guilty of conspiracy but not of the substantive crimes and the court said the substantive offense charged was that of an "accessory"); Morris v. United States, 7 F. (2d) 785 (C.A. 8th, 1925) (the defendants were found guilty of conspiracy but acquitted of the substantive offenses); United States v. Kane, 23 Fed. 743 (Colo. 1885) wherein all were present at the scene of the substantive crime.

as bare conspirators, are found to follow the erroneous reasoning of previous decisions where the defendants were in fact accomplices, but loosely described as conspirators.[12]

To charge one man with another's crimes where there is no active encouragement or even knowledge of those crimes is antithetical to our notions of due process. As indicated, there was no precedent for this move by the Court in *Pinkerton*. Mistaken interpretation and invalid analogies do not buttress such a doctrine. The most that can be salvaged from the Court's argument is that aiding and abetting may overlap conspiracy and be provable along with it in separate substantive counts. At the outside, it may be argued that there is a degree of involvement less than aiding and abetting that may suffice, but there is no authority to make conspiracy the equivalent of aiding and abetting. To uphold such a rule causes a host of unnecessary problems, inequities and discrepancies and runs counter to the will of the Legislature in this regard.

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[12] Mackett v. United States, 90 F. (2d) 462 (C.A. 7th, 1937), wherein the conspiracy and substantive counts were proved on distinctly separate evidence. This case cites Spear v. United States, 228 Fed. 485, 488 (C.A. 8th, 1915) wherein Hook, J., said: " . . . the contriving of a scheme to defraud substantially as set forth must be shown beyond a reasonable doubt, and so of the use of the mails"; Blue v. United States, 138 F. (2d) 351 (C.A. 6th, 1943), giving as its authority Davis v. United States, 12 F. (2d) 253 (C.A. 5th, 1926) in which there was no conspiracy indictment, the defendants being convicted as accomplices, but their scheme being described as a conspiracy; Brown v. United States, 150 U.S. 93 (1893); Logan v. United States, 144 U.S. 263 (1892); United States v. Gooding, 12 Wheat, 460 (U.S. 1827) wherein the defendants were convicted on evidence of aiding and abetting although described as conspirators.

IV. Vicarious Liability — An Unintended Doctrine

As Justice Rutledge noted in his dissent in *Pinkerton*, Congress has expressed its will in defining three separate types of crimes: conspiracy, consisting of agreement and intent, aiding and abetting, (the gist of which is "consciously advising or assisting another to commit particular offenses and thus becoming a party to them," *Pinkerton* v. *U.S.*, *supra*, at p. 649,) and substantive crime.

That these are separate and distinct grounds of criminal liability can best be understood by examining decisions like *Moorehead* v. *U.S.*, 270 F 210 (1921) and *Joplin Mercantile Co.* v. *U.S.*, 236 US 531 (1915), in which defendants, previously acquitted of substantive crimes, were later convicted of conspiracy to commit these same crimes, and were held not to have been subjected to double jeopardy. In *Westfall* v. *U.S.*, 20 F2d 604 (CA 6, 1927), the defendant was first convicted of a substantive crime and later indicted for conspiracy to commit that crime; again, it was denied that there was double jeopardy, the indictments being described as separate offenses arising from the same transaction. *Gavieres* v. *U.S.*, 220 US 338 (1911).

The plea of double jeopardy was refused in still another case, that of *Bens* v. *U.S.*, 266 F 152, 160 (1920), where the defendant was indicted for aiding the substantive crime after an acquittal of the conspiracy charge, Justice Rogers saying, ". . . neither an acquittal nor a conviction of a conspiracy to commit a crime is a bar to a prosecution for the commission of that crime or for aiding and abetting another to commit it." But this would not be so if the evidence required to support a conviction upon

one of them would have been sufficient to warrant a conviction upon the other, for this is the test of double jeopardy. Separate and distinct evidence over and above that necessary to convict for conspiracy must be necessary to convict for the substantive crimes involved in any conspiracy.

The anomaly of holding on the one hand that the conspiracy and the substantive offense it was to accomplish are separate and distinct offenses so far as double jeopardy is concerned, yet on the other hand that the precise evidence sufficient to convict in the case of a bare conspiracy is automatically evidence sufficient to convict on the substantive count, seemingly results, in the latter case, in a situation where one may be convicted on a charge not proved against him or on evidence showing that he committed another. The result is a vicarious criminal responsibility as broad as the civil liability of a partner for the acts of his co-partner in the course of aiding and abetting. But it must be remembered that the substantive offense is no part of the crime of conspiracy, and that a conspiracy itself does not violate the statute whose violation is the object of the conspiracy. Furthermore, in applying a principle, extracted from the definition of an accomplice, to a conspirator, the basic mark of distinction between the two separately defined types of responsibility for crime is thus removed. Concededly, in practical application, it is difficult to determine precisely when a man ceases to be a conspirator and becomes an accomplice. It is this difficulty of distinction which is the underlying cause of the inaccuracies which appear in the decisions. The difficulty in applying the distinction should be no excuse for ignoring it. Without making this differentiation, there can be no objection to assertion of the defense of double jeopardy. To rule otherwise would be to allow the government an untenable advantage.

Finally, for the judiciary to ignore these distinctions and blend conspiracy with aiding and abetting, is to violate the constitutional separation of powers doctrine and all canons of judicial restraint. Yet, this is precisely what the Court in *Pinkerton* did if the rule it announced is to be applied in cases similar to the present one.

V. Fair Warning

As it is clear that neither the aiding and abetting nor the conspiracy statutes give any hint of the inherent overlap the Trial Court or the government would have this Court believe exists, a most basic tenet of due process, fair notice to the defendant is missing from the proceedings. As this Court ruled in *Lanzetta* v. *N.J.*, 306 US 451-459 (1939):

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statute. All are entitled to be informed as to what the State commands or forbids."

In *McBoyle* v. *U.S.*, 283 US 25-27 (1931), this Court stated:

> "Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."

Further, it cannot be claimed that the case law on the subject gives any greater degree of warning. As the preceding cases dealing with double jeopardy and the examination of the foundation cases of *Pinkerton* make apparent, the equation of conspiracy and aiding and

abetting is not consistent. It can as well be assumed that it will not occur as that it will, in any given prosecution.

To allow amorphous guidelines in statutory application is to rob the defendant of his right to mount a successful vagueness challenge. Uncertain parameters subject him to arbitrary enforcement of the statutes and the *Pinkerton* rule, in violation of equal protection of the law.

It is no answer to this argument that the defendant may have willfully engaged in conspiratorial conduct and so is not disadvantaged by being subjected to aiding and abetting charges because they are somewhat similar. These are two distinct and separate crimes and if a fair warning of one is given, it does not follow that all other charges are also fairly brought to defendant's notice.

To so construe the aiding and abetting statute to include conspiracy is to violate a fundamental rule of statutory construction:

> "Where the language (of a statute) is plain and admits of no more than one meaning, the duty of interpretation does not arise and rules which are to aid doubtful meanings need no discussion." *Caminetti* v. *U.S.*, 242 US 470 (1917).

The statute sets forth a list of acts which unquestionably require a degree of active participation and encouragement. The case law arising from it reinforces this conclusion. Historically, the meaning of aiding and abetting has not been else. Stretching the plain meaning of 18 USC §2 to include mere conspiracy without more is to do violence to the lines of precedents stemming from the interpretation rule and those derived from the aiding and abetting laws as well as the legislative intent in separating 18 USC §2 and 21 USC §846.

VI. Unnecessary Complication of Criminal Jurisprudence

Beyond adding to the prosecutor's already weighty arsenal of conspiracy-related weapons and traps, there is no actual use or need for the *Pinkerton* rule. Indeed, it provides counterproductive problems of its own. Appellant shares the conclusions reached after an exhaustive examination of the *Pinkerton* rule conducted by the National Commission for the Reform of the Federal Criminal Laws:

> "If an organized crime offense, or something similar, and the felony murder doctrine are available, there seems little, if anything, to gain from the *Pinkerton* doctrine. . . . At the same time the *Pinkerton* doctrine could be the source of otherwise avoidable problems:
>
> (a) Is a co-conspirator liable for crimes committed before he joined the conspiracy, as he is for overt acts (a principle which serves another purpose)?
>
> (b) Do different rules of evidence apply to his liability for conspiracy and his liability for this specific offense?
>
> (c) Can he be acquitted for conspiracy and retried for the specific offense?
>
> (d) Should the test of withdrawl from the conspiracy be the same as for terminating liability for the specific offense?
>
> "Policy argument favoring Pinkerton liability has been stated as being that the criminal acts are sufficiently dependent upon the encouragement and material support of the group as a whole and

> warrant treating each member as a causal agent. While there is plausibility to this view, the argument seems to go no further than to support the provision which makes mere membership in a conspiracy a crime even though there is no complicity relationship to the crimes which may be committed."

Jurisprudential development is not aided by tangential and misapplied spin-offs of other doctrine which serve only to obfuscate, not clarify, existing law.

VII. Inequities

The theoretical groundwork for appreciating the unreasonable expansion of conspiracy law through the *Pinkerton* rule has been developed. However, it is instructive to examine an actual application of theory to fact in order to grasp the full import of such a doctrine.

In the typical vice ring for example, there are large numbers of prostitutes and runners, a smaller number of procurers and a few overlords. In the course of operating such a conspiracy, a great many and varied criminal acts are possible (bribery, robbery, violent crimes, et al.) Should the girl on the street be responsible for the substantive crimes of everyone in that conspiracy merely because she is a member of it?

This question takes on greater significance if she is to be held for reasonably forseeable crimes as the case seems to dictate. She might, in fact, be convicted on the basis of negligence for an act that clearly requires intent (bribery, etc.) because she is inexperienced in the ways of her criminal bosses. While it may be reasonable to hold those controlling the operation as aiders and abettors of specific offenses in which they do not participate because of their far more clear "instigator" role, *Pinkerton* v. *U.S.*, *supra*, at p. 647, *Pinkerton* would

sweep all under the double liability. To permit such scope to a rule founded on cases requiring aiding and abetting would cause the law to "lose all sense of proportion."[13]

The same arguments can be advanced for the other victimless crime conspiracies (narcotics and gambling), and indeed the present case is a concrete example.

The rationale proposed for cumulating sentences under these conditions is that the confederation poses a greater threat than the substantive offense which is its object. In rejecting this reasoning, the drafters of the ALI Model Penal Code declared:

> "When a conspiracy is declared criminal because its object is a crime, we think it entirely meaningless to say that the preliminary combination is more dangerous than the forbidden consummation; the measure of its danger is the risk of such culmination.[14]

In the present case the object of the conspiracy and the substantive offense as charged was the same. To cumulate the offenses would be to unnecessarily disadvantage the defendant without reason, and so, should not have been done.

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[13] ALI Model Penal Code, n. 1 §2.04.

[14] ALI Model Penal Code §5.03 Comment (Tent. Draft No. 10, 1960).

VIII. The Proposed Solutions

The *Pinkerton* rule, as the government would have it interpreted, has now been *specifically rejected* by the two groups given the task of improving criminal jurisprudence in the United States.

The ALI Model Penal Code, in its first tentative draft (1953), gave this rendition of an acceptable formulation:

"Section 2.04. Liability based on behavior; Liability for behavior of another; Complicity

> (3) A person is an accomplice of another person in commission of a crime if:
>
> (a) with the purpose of promoting or facilitating the commission of the crime, he
>
> (1) commanded, requested, encouraged or provoked such other person to commit it; or
>
> (2) aided, agreed to aid or attempted to aid such other person in planning or committing it; or
>
> (3) having a legal duty to prevent the crime, failed to make proper effort so to do; or
>
> (b) acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly, substantially facilitated its commission; or
>
> [Alternate: (b), acting with knowledge that such other person was committing or had the purpose of committing the crime, he knowingly provided means or opportunity for the commission of the crime, substantially facilitating its commission; or]

(c) his behavior is expressly declared by law to establish his complicity."

As can be readily seen, *a greater degree of connection than mere conspiracy is required* (substantial facilitation or statutory aiding and abetting).

> "The reason for this treatment is that there appears to be no other or better way to confine within reasonable limits the scope of liability to which conspiracy may theoretically give rise."[15]
>
> "The right way it is submitted, is to measure liability by the criteria proposed. Conspiracy may prove command, encouragement, assistance or agreement to assist, etc.; it is evidentially important and maybe sufficient for that purpose. But whether it suffices ought to be decided by the jury; they should not be told that it establishes complicity as a matter of law."(Id.)

The lesser connection still requires "substantial facilitation" connoting something closely akin to aiding and abetting. It does not suggest (as the drafters make clear) that merely joining a conspiracy and possessing the intent to further the confederation's purposes is sufficient.

> "While this alternative should be considered, it is not, in our opinion, to be preferred."[16]

The National Commission on the Reform of the Federal Criminal Laws rejects this alternative completely. Its formulation is presented below:

> "Chapter 4. Complicity.
>
> "§401. Accomplices.

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[15] ALI Model Penal Code, n.1 at 21.

[16] id. at 32.

(1) Liability Defined. A person may be convicted of an offense based upon the conduct of another person when:

> (a) acting with the kind of culpability required for the offense, he causes the other to engage in such conduct; or
>
> (b) with intent that an offense be committed, he commands, induces, procures, or aids the other to commit it or, having a legal duty to prevent its commission, he fails to make proper effort to do so; or
>
> (c) he is a co-conspirator and his association with the offense meets the requirements of either of the other paragraphs of this subsection."

In explication, the drafters took this position:

> "Aiding should mean something more than the attenuated connection resulting solely from membership in a conspiracy, and the objective standard of what is reasonably foreseeable."[17]

It may safely be assumed that the august body of legal scholars who were involved in making the decision to reject *Pinkerton* did so after careful and full evaluation of its effects and portent. Petitioner urges this Court to take careful note of the result of their research in making its own decision.

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[17] National Commission, Final Draft n.1 at 156.

IX. Conclusion: Application to the Present Case

To recapitulate, it has been demonstrated that no aiding and abetting as defined by the controlling statute (18 USC §2) took place. The inescapable conclusion is that the *Pinkerton* rule, as the government interprets it, was used to provide the connection.

It has been further shown that the majority opinion in *Pinkerton* was based upon cases where actual aiding and abetting had taken place. Indeed, in the principal case itself, there was evidence of aiding and abetting in that the two brothers mutually planned and encouraged each other towards their specific illegal ends which were the substantive offenses. A few cases where aiding and abetting had not been present were based on the inapposite analogy of the overt act being applied to all members of the conspiracy, thus making it reasonable for substantive offenses to be so applied. Some were also grounded in the equally inappropriate transposition of partnership liability from the civil tort field to criminal liability.

Several major objections have been lodged against this faulty doctrine. They include (1) violation of legislative intent, (2) violation of separation of powers doctrine, (3) violation of statutory rules of construction, (4) violation of due process and equal protection of the laws by not giving fair warning, (5) unnecessary complication of criminal jurisprudence, and (6) demonstrated potential for great inequity in application.

Petitioner asserts that the conclusion required is that the *Pinkerton* doctrine, of questionable legal validity at its inception, has lost any vitality it may have had when applied as in the present case. As such, it is a dangerous, unfair and unnecessary pitfall in the path of those who are legally guilty only of lesser or fewer crimes.

The Sixth Circuit never reached the merits of the above arguments. The sole response of that Court was:

> "Appellants vigorously attack the validity of the rule announced in Pinkerton v. United States, 328 U.S. 640 (1946) that even if he did no more than join a conspiracy, a conspirator can be convicted of any substantive offense committed in furtherance of the conspiracy and as a part of it. Appellants contend that the Pinkerton rule is bad law, and that this court should not follow it. Our court, however, is constitutionally required to follow the Supreme Court's decision in Pinkerton and the cases following it, which have never been overruled, or even questioned by the Supreme Court." App. C infra at 98

The continued use of a harsh doctrine based on erroneous application of forced analogies should not serve to give it any legitimacy. If mere passage of time is sufficient to legitimate otherwise unjustified practices affecting the lives of American citizens, progress will forever be thwarted.

In light of the above factors and the great weight they bear, Petitioner prays this Court limit the application of the *Pinkerton* doctrine to cases where it is found, at the very least, that there is substantial facilitation of the perpetrators' illegal acts by the defendant and not mere membership in the primary conspiracy. This connection existed in the *Pinkerton* case and made other rulings mere obiter dicta in any event.

To fully accord with the "better view" of the law, Petitioner requests that actual aiding and abetting must be required before attribution of accomplice liability be acceptable. *Pinkerton* itself bears this interpretation and the accurate cases which are its foundation are in accord. Consequently, this Court is asked to restrict the use of an oppressive doctrine. And in so doing, Petitioner specifically prays that his convictions for those substantive crimes in which he had no part be reversed and dismissed.

II.

PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL IN HIS TRIAL WHERE TWO ATTORNEYS REPRESENTED OVER TWENTY DEFENDANTS, ONLY ONE OF WHICH WAS A PAYING CLIENT, WHERE PETITIONER WAS ONLY PERIPHERALLY INVOLVED AN WHERE NO MOTION FOR SEVERANCE WAS MADE TO AVOID TRANSFERENCE OF GUILT.

The prosecution out of which this petition grows commenced with two indictments charging some thirty-two persons with a total of about thirty-three counts. Five of the defendants were severed for reasons not known to present counsel for Petitioner Hurt.

The two cases, each assigned to a different trial judge, were tried, in a manner of speaking, side by side. Two attorneys represented more than twenty defendants in these simultaneous trials, and this representation included Petitioner Hurt.

The attorneys were two of the most able and experienced in the country. But representing more than twenty separate interests is a gigantic undertaking and must tax even the best to the limit.

While all the clients get the benefit of the good that emanates from the efforts and talents of two highly competent attorneys, it stands to reason that the individual interests of some client must suffer.

A plea of "not guilty" joins the issue and raises a denial by a defendant of every material allegation of crime lodged against the individual making the plea. Thus, by his plea of not guilty, Appellant Hurt denied the conspiracy and each of the substantive counts.

The facts reveal that Petitioner Hurt had a direct and personal connection with only one of fifteen substantive counts and with only two of the defendants. The finding of the "sample" of heroin in his car on which Count 7 was based raises some question as to proof of his ownership or knowledge of the presence of the small exhibit. Hurt, further, was in the exact position of those severed defendants insofar as the pleadings were concerned. But certainly the fact situation suggested only the most minimal contact between Hurt and anyone else charged in either of the two indictments.

Hence it would appear that he would have had every reason for a severance of his case. Yet nowhere does the record reveal a motion for severance on his part. Such a severance could also have been achieved by his simply refusing to waive a jury. Again no such trial tactic was attempted on behalf of Hurt — nor for any of the defendants represented by the main legal team.

This case, as in most cases, has a "pecking order" of importance among the defendants. It is obvious from the entire record that there were several men who stood high in the organization and consequently had to be the object of greater concern for the attorneys representing them.

It is true that the Trial Court acquitted some defendants. But it is notable that in arriving at the conclusion to convict Petitioner Hurt, the Court found the evidence as to him "not as overwhelming". The fact of the matter was that there was insufficient evidence to convict him of participation in the single conspiracy charged or of at least fourteen substantive counts with which fact situations he had no involvement in the one count in which he was involved because of the weak nature of the evidence.

The prejudice to his cause becomes apparent when analyzed in the light of what was best for Petitioner Hurt in terms of retaining him in the mass trial.

If the proper defense for Hurt was to minimize his association with the "in-house" organization, then remaining in the joint trial could only represent a conflict of interest between him and every other defendant in the trial.

The U.S. Supreme Court addressed itself to the question of ineffective representation of counsel occasioned by joint representation of co-defendants in *Glasser* v. *U.S.*, 315 US 60 (1941). Glasser, one of five co-defendants, was an Assistant U.S. Attorney convicted of conspiracy to defraud the federal government by accepting bribes to affect the prosecution of federal tax cases.

Over the objection of Glasser, his privately retained counsel was appointed to represent co-defendant Kreske. On appeal Glasser claimed that because his attorney represented two persons with conflicting defense needs, his counsel was prevented from adequately safeguarding his right to have incompetent evidence excluded and to have witnesses fully cross-examined.

In holding that Glasser was denied his Sixth Amendment right to effective counsel, the court looked to conflict of interest and resulting prejudice. However, it refused to formulate a test by which the exact degree of prejudice necessary to find ineffective counsel could be measured:

> "To determine the precise degree of prejudice sustained by Glasser as a result of the Court's appointment . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to engage in nice calculations as to prejudice arising from its denial." *Supra*, p. 76.

In addition to looking to conflict of interest and prejudice to determine whether ineffective counsel exists, the court seems to have propounded another standard, that of impairment of counsel:

> " . . . Glasser wished the benefit of the undivided assistance of counsel of his choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest the additional burden of representing another party may conceivably impair counsel's ineffectiveness." *Supra*, p. 75.

It is interesting to note that another factor mentioned by the court was the nature of conspiracy trials themselves. The court stated that undivided assistance in such cases is especially important because of "the liberal rules of evidence in conspiracy cases and the wide latitude allowed prosecutors and the resultant opportunity that unfairness may occur to individual defendants", at p. 76.

Finding that counsel was "not as effective as it might have been if the appointment hadn't been made," the court set aside the verdict, at p. 76.

The rather sweeping language of *Glasser* has been variously applied in the various jurisdictions.

It is generally agreed that a showing of prejudice is required to establish ineffective assistance of counsel. This is usually supported by the fact that in *Glasser* the court overturned only Glasser's conviction, requiring Kreske to show he was prejudiced by joint representation in order for his conviction to be overturned also, at p. 77.

The Sixth Circuit has required a showing of conflict of interest or prejudice by the co-defendant represented by

joint counsel who is claiming deprivation of his right to effective counsel. *Burkeen* v. *U.S.*, 355 F2d 241 (6th Cir. 1966). Thus, in *Burkeen*, the Sixth Circuit found no deprivation of the Sixth Amendment rights of the co-defendants who were convicted of bank robbery while jointly represented by appointed counsel. There was no showing of either conflict of interest or prejudice. See also *U.S.* v. *Berriel*, 371 F2d 587 (6th Cir. 1967).

In *Craig* v. *U.S.*, 217 F2d 355 (C.A. 6, 1954), the Sixth Circuit offers an opportunity to see how conflict and prejudice is determined. Craig was tried for the aiding of the fraudulent preparation of tax forms. His former employer was a co-defendant. Both were represented by the company attorney and both were convicted.

Craig, who had been the company comptroller, claimed that during the trial of a conflict of interest developed between him and his co-defendant, the company president, when it became expedient for Craig's employer to shift responsibility for the preparation of certain forms to subordinates, including Craig. Because of this conflict of interest, his attorney did not afford him adequate representation. In support of the claim of ineffective representation, Craig cited the attorney's failure in cross-examining a witness who was testifying to a meeting with Craig's co-defendant to elicit whether Craig was present or not.

The court found that in this case, joint representation resulted in a denial of Craig's Sixth Amendment right to effective counsel. In coming to this decision, the court cited the following factors:

> -conflict in interest prevented a proper cross-examination of a witness whose testimony was given considerable weight

> -that such a cross-examination would in all probability have been made by counsel who had no interest in Craig's co-defendant
>
> -that weakening of such testimony against Craig might have had a material effect on the outcome
>
> -that as a result of the conflict, counsel's representation of Craig was not as effective as it might have been
>
> -that in representing both defendants counsel undertook to perform a difficult if not impossible task
>
> -whether the result would have been different if counsel had devoted his talents unreservedly in the interest of Craig could not have been determined, *supra*, p. 359.

Citing *Glasser*, discussed *supra*, the Sixth Circuit has found that the exact degree of prejudice to a co-defendant who is represented by joint counsel does not have to be established in order to show ineffective representation. However, it is apparent that more than a mere possibility of prejudice must be established, and that the court should be shown that the conflict of interest might have affected the outcome of the case.

Other courts have applied a lesser standard than that of the *Craig* court. A California court has held that once a potential conflict of interest is shown as the result of joint representation, the prosecution has the burden of proving beyond a reasonable doubt that the resulting prejudice was harmless. *People* v. *Thompson*, 13 CA3d 47, 54-55 (1970).

WAIVER

The presumption against waiver of a constitutional right applies to waiver of the right to effective counsel. *Craig* v. *U.S.*, 217 F2d 355, 359 (6th Cir. 1954). Thus, in *Glasser* v. *U.S.*, 315 U.S. 60 (1964), the failure to renew objections to the appointment of defendant Glasser's attorney to represent a co-defendant also, could not be construed as tacit waiver, even though Glasser was an attorney himself.

In *Craig, supra*, defendant, the corporation comptroller, was represented by the company attorney, who also represented the co-defendant, the company president. Assured by counsel that there was no danger of conviction, Craig did not seek independent counsel. Although not indigent, he felt that he could not afford separate counsel and was not aware that he could petition the court for separate counsel. Under these circumstances, the Sixth Circuit found that failure to assert the right to separate counsel did not constitute a waiver.

Nor should Hurt be penalized if the human instinct to follow the crowd being led by two gifted attorneys actually resulted in a prejudice had he been able to analyze his own case as it weighed against being one of some twenty persons getting joint representation. The prejudice is neither illusory nor imaginary, and represents a clear violation of his Sixth Amendment right to effective assistance of counsel at both the pre-trial and trial stages.

As the Government is disposed to bringing an increasing number of these mass prosecutions and is aware that most of the defendants ensnared in its nets will be indigent and forced to accept the representation

obtained by the real perpetrators of the crime, it is important that the Court provide specific guidelines to insure that these individuals are fully represented, instead of being forced to accept tactical decisions designed to benefit the paying clients or their attorneys alone.

RELIEF REQUESTED

For the foregoing reasons, Petitioner prays that his Petition for Certiorari be granted.

Respectfully submitted,

S. ALLEN EARLY, JR.

RALPH H. RICHARDSON
Attorneys for Petitioner
810 Buhl Building
Detroit, Michigan 48226
(313) 963-6093

Detroit, Michigan
November 22, 1976

APPENDIX A

INDICTMENT

(United States District Court —
Eastern District of Michigan —
Southern Division)

United States of America, Plaintiff, vs. Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Aggustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D. and Leo Hurt, Jr., Defendants.

The Grand Jury charges:

COUNT ONE

From on or about the 26th day of September 1971 and continuously thereafter, up to and including the 15th day of December 1971, in the Eastern District of Michigan, and elsewhere, Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene"

"Barbershop Man" Horne, Alphonso Aggustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D. and Leo Hurt, Jr., the defendants herein, willfully and knowingly did combine, conspire, confederate and agree together, with each other, with the unindicted co-conspirators Willie Lee "Big Willie" "G. Wilson" Kilpatrick, Joseph Leon "Joe" Weaver, James Reginald "Reggie" Weaver, DeWitt Bailey, Sheila "Sam" Davis, Richard "Rick" Lagrant, Elizabeth "Liz" Thomas, Robert "East Side Bobby" Malone, George Murphy, Roosevelt "Johnnie Quick" Nabors, Cara "Jones" Woods, Jr., and J.C. Rex, and with divers other persons whose names are to the Grand Jury unknown, to knowingly and intentionally manufacture and distribute, and possess with intent to manufacture and distribute divers quantities of heroin, a schedule I narcotic drug controlled substance, and cocaine, a schedule II narcotic drug controlled substance, in violation of Section 841(a)(1), Title 21, United States Code.

2. It was a part of said conspiracy that the defendants and co-conspirators Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair and Herbert L. "Bubba" Bell would organize, supervise and manage a heroin and cocaine manufacturing and distributing business operated from the Detroit, Michigan, area.

3. It was further a part of said conspiracy that the defendants and co-conspirators Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Aggustus "Al" Jones, Charles "Great Dolph" Rudolph, and Charles S. "C Yergin" Reynolds and the unindicted co-conspirator Willie Lee "Big Willie" "G. Wilson" Kilpatrick would possess heroin and cocaine bought in Detroit and caused to be bought in Detroit and brought to Detroit and caused to be brought to Detroit, Michigan, by defendants and co-conspirators Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair and Herbert L. "Bubba" Bell, and would manufacture and distribute the heroin and cocaine [copy illegible] and wholesale distributors of heroin and cocaine and to persons to the Grand Jury unknown.

4. It was further a part of said conspiracy that the unindicted co-conspirators Joseph Leon "Joe" Weaver, James Reginald "Reggie" Weaver and Zackary "Zack" Garrett would answer telephones, coduct counter-surveillance to discover law enforcement operations, and aid in the process of manufacturing the heroin and cocaine.

5. It was further a part of said conspiracy that the defendant and co-conspirator Fairh Lee "P. Griggs" Riggs would transport to the Detroit, Michigan area and act as custodian of funds to be used in purchasing narcotic drug controlled substances.

6. It was further a part of said conspiracy that the defendants and co-conspirators Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., and the unindicted co-conspirators Duane Adams, Sharlene "Duane's Wife" Adams, DeWitt Bailey, Sheila "Sam" Davis, Richard "Rick" Lagrant, Elizabeth "Liz" Thomas, Robert "East Side Bobby" Malone, George Murphy, Roosevelt "Johnnie Quick" Nabors, Cara "Jones" Woods, Jr., and J.C. Rex would act as wholesale distributors of heroin and cocaine in the Detroit, Michigan area would be "preferred customers" of the Jackson Organization and would purchase exclusively from one of the Jackson Organization's Agents listed in paragraph number three, Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George, Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Aggustus "Al" Jones, Charles "Great Dolph" Rudolph, and Charles S. "C. Yergin" Reynolds, and the unindicted co-conspirator Willie Lee "Big Willie" "G. Wilson" Kilpatrick.

OVERT ACTS

At the times hereinafter mentioned, the defendants and co-conspirators committed the following overt acts in furtherance of said conspiracy and to effect the objects thereof:

1. On or about September 26, 1971, the defendants Fairh Lee "P. Griggs" Riggs and Charles S. "C. Yergin"

Reynolds and the unindicted co-conspirator Willie Lee "Big Willie" "G. Wilson" Kilpatrick travelled from Detroit, Michigan, to New York City, New York.

2. On or about November 19, 1971, at approximately 11:49 p.m. the defendant George "George Jr." Blair and the unindicted co-conspirators Duane Adams and Joseph Leon "Joe" Weaver had a telephone conversation.

3. On or about December 9, 1971, at approximately 6:45 p.m. the defendants George "George Jr." Blair and Samuel Eugene "Gene" "Barbershop Man" Horne and the unindicted co-conspirator Joseph Leon "Joe" Weaver had a telephone conversation.

4. On or about December 12, 1971, at approximately 3:18 p.m., the defendants George "George Jr." Blair and Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh had a telephone conversation.

5. On or about December 12, 1971, at approximately 9:13 p.m. the defendants Charles "Great Dolph" Rudolph and Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown had a telephone conversation.

6. On or about December 14, 1971, at approximately 4:45 p.m., the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Mr." "Chief" "The Fat Man" "Boss" Jackson, George "George Jr." Blair and Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh had a telephone conversation.

7. On or about December 15, 1971, at approximately 8:08 p.m., the defendants Leo Hurt, Jr., and George "George Jr." Blair had a telephone conversation.

All of the foregoing in violation of Title 21, United States Code, Section 846.

COUNT TWO

On or about October 18, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Aggustus "Al" Jones, Charles S. "C. Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D. and Leo Hurt, Jr., knowingly and intentionally did distribute and aided and abetted, counseled, commanded, induced and procured the distribution of about 21.79 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT THREE

On or about October 22, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonso Aggustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great

Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D. and Leo Hurt, Jr., knowingly and intentionally did distribute and aided and abetted, counseled, commanded, induced and procured the distribution of about 151.08 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT FOUR

On or about November 4, 1971, in the Eastern District of Michigan, the defendants, Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C. Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally did distribute and aided and abetted, counseled, commanded, induced and procured the distribution of about 157.15 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT FIVE

On or about November 8, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonso Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alfonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally did distribute and aided, abetted, commanded, induced and procured the distribution of about 21.785 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and of Title 18, United States Code, Section 2.

COUNT SIX

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great

Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally did distribute and aided, abetted, commanded, induced and procured the distribution of about 1,924.5 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and of Title 18, United States Code, Section 2.

COUNT SEVEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonso Acgustus "Al" Jones, Charles S. "C. Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally did distribute and aided and abetted, counseled, commanded, induced and procured the distribution of a sample quantity of about 0.268 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and of Title 18, United States Code, Section 2.

COUNT EIGHT

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C. Yergin" Reynolds, Fairh Lee "P. Griggs" "Riggs, Charles "Great Dolph" Rudolph, Charles "Mr K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D. and Leo Hurt, Jr., knowingly and intentionally did distribute and aided, abetted, commanded, induced and procured the distribution of about 137.35 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and of Title 18, United States Code, Section 2.

COUNT NINE

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great

Dolph" Rudolph, Charles "Mr K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally did distribute and aided, abetted, commanded, induced and procured the distribution of about 37.66 grams of cocaine, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1) and of Title 18, United States Code, Section 2.

COUNT TEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" "Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally possessed with, and aided and abetted, counseled, commanded, induced and procured the possession with, intent to manufacture and distribute about 1,924.5 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT ELEVEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally possessed with, and aided and abetted, counseled, commanded, induced and procured the possession with, intent to manufacture and distribute a sample quantity of about 0.268 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT TWELVE

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne,

Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally possessed with, and aided and abetted, counseled, commanded, induced and procured the possession with intent to manufacture and distribute of about 659.66 grams of cocaine, a schedule II narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT THIRTEEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D. and Leo Hurt, Jr., knowingly and intentionally possessed with and aided and abetted, counseled, commanded, induced and procured the possession with intent to manufacture and distribute of about 681.80 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT FOURTEEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great Dolph" Rudolph, Charles "Mr. K" "Mr. KK" "Governor" Cavanaugh, Lamar "Dr." Esters, Laticia "Tish" Burns, Maurice Thompson, Alphonso "Al" Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally possessed with, and aided and abetted, counseled, commanded, induced and procured the possession with intent to manufacture and distribute of about 45.30 grams of cocaine, a schedule II narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT FIFTEEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants, Eddie "Mr. President" "Big Man" "Big Fellow" "Big Duck" "Dr." "Chief" "The Fat Man" "Boss" Jackson, Courtney "Mr. Vice-President" "James Brown" "The Professor" "The Vice" Brown, George "George Jr." Blair, Herbert L. "Bubba" Bell, Ronald "Agent Five" "Five" Garrett, Samuel Eugene "Gene" "Barbershop Man" Horne, Alphonzo Acgustus "Al" Jones, Charles S. "C Yergin" Reynolds, Fairh Lee "P. Griggs" Riggs, Charles "Great

Dolph'' Rudolph, Charles ''Mr. K'' ''Mr. KK'' ''Governor'' Cavanaugh, Lamar ''Dr.'' Esters, Laticia ''Tish'' Burns, Maurice Thompson, Alfonso ''Al'' Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally possessed with, and aided and abetted, counseled, commanded, induced and procured the possession with, intent to manufacture and distribute of about 14.66 grams of cocaine, a schedule II narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

COUNT SIXTEEN

On or about December 15, 1971, in the Eastern District of Michigan, the defendants Eddie ''Mr. President'' ''Big Man'' ''Big Fellow'' ''Big Duck'' ''Dr.'' ''Chief'' ''The Fat Man'' ''Boss'' Jackson, Courtney ''Mr. Vice-President'' ''James Brown'' ''The Professor'' ''The Vice'' Brown, George ''George Jr.'' Blair, Herbert L. ''Bubba'' Bell, Ronald ''Agent Five'' ''Five'' Garrett, Samuel Eugene ''Gene'' ''Barbershop Man'' Horne, Alphonzo Acgustus ''Al'' Jones, Charles S. ''C Yergin'' Reynolds, Fairh Lee ''P. Griggs'' Riggs, Charles ''Great Dolph'' Rudolph, Charles ''Mr. K'' Mr. KK'' ''Governor'' Cavanaugh, Lamar ''Dr.'' Esters, Laticia ''Tish'' Burns, Maurice Thompson, Alphonso ''Al'' Finch, Theodore L. Hughes, M.D., and Leo Hurt, Jr., knowingly and intentionally possessed with, and aided and abetted, counseled, commanded, induced and procured the possession with, intent to manufacture and distribute of about 2,589.93 grams of heroin, a schedule I narcotic drug controlled substance; in violation of Title 21, United States Code, Section 841(a)(1), and of Title 18, United States Code, Section 2.

This is a true bill

FOREMAN

APPENDIX B

ORDER OF AFFIRMANCE

Office of the Clerk
United States Court of Appeals
For the Sixth Circuit
Cincinnati, Ohio 45202

(October 8, 1976)

Mr. Laurence Leff, Mr. James K. O'Malley, Mr. Philip Van Dam, Mr. Reuben H. Wallace, Mr. Milton R. Henry, Mr. S. Allen Early, Jr., Mr. Wilfred C. Rice.

Re: United States of America vs. Cara Woods, Jr., et al. Our Nos. 74-2337-74-2353, Dist. Ct. Nos. Criminal 46598 & 46597

Gentlemen:

The Court today announced its decision in the above-entitled case.

A copy of the Court's opinion is enclosed, and a judgment in conformity with the opinion has been entered today as required by Rule 36, Federal Rules of Appellate Procedure.

Each party will bear its own costs on this appeal.

Very truly yours,
JOHN P. HEHMAN, Clerk

By: /s/ Betty Tibbles
Deputy Clerk

Enclosure

APPENDIX C

OPINION

(United States Court of Appeals
for the
Sixth Circuit)

Nos. 74-2337-53

United States of America, *Plaintiff-Appellee* v. Cara Woods, Jr., Willie Lee Kilpatrick, Joseph Leon Weaver, James Reginald Weaver, Eddie Jackson, Courtney Brown, Herbert Bell, Ronald Garrett, Samuel Horne, Alphonzo Jones, Fairh Lee Riggs, Charles Rudolph, Laticia Burns, Maurice Thompson, Leo Hurt, George Blair, Charles Cavanaugh, *Defendants-Appellants*.

On Appeal from the United States District Court for the Eastern District of Michigan, Southern Division.

(Decided and Filed October 8, 1976)

Before: Celebrezze, McCree, and Miller,* Circuit Judges.

McCree, Circuit Judge. We have consolidated for consideration the appeals of seventeen defendants from their convictions in the Eastern District of Michigan. Each appellant had been charged in one of two similarly worded indictments with sixteen violations of federal narcotics laws, 21 U.S.C. §§ 841 and 846. One indictment, hereinafter the Jackson indictment, named fifteen unindicted co-conspirators and seventeen

*The Honorable William E. Miller died on April 12, 1976 and did not participate in this opinion.

defendants, including appellants Eddie Jackson, Herbert Bell, Ronald Garrett, Samuel Horne, Alphonzo Jones, Fairh Lee Riggs, Charles Rudolph, Charles Cavanaugh, Laticia Burns, Maurice Thompson, Leo Hurt, George Blair and Courtney Brown. The other indictment, hereinafter the Kilpatrick indictment, named as defendants the fifteen persons who were unindicted co-conspirators in the earlier indictment, including appellants Willie Kilpatrick, Joseph Weaver, James Weaver, and Cara Woods. The persons named as defendants in the first indictment were named as unindicted co-conspirators in the second indictment. Count 1 of both indictments charged a single conspiracy that continued from September to December 1971 to manufacture, distribute, and possess heroin and cocaine in violation of 21 U.S.C. § 846. Counts 2 through 16 charged substantive violations of 21 U.S.C. § 841 committed during the period from October to December 1971.

One of these cases was assigned to District Judge John Feikens for trial, and the other to District Judge Philip Pratt, both of whom are Judges of the Eastern District of Michigan. Consolidated pretrial evidentiary hearings were held to consider various motions raised by appellants. In addition to waiving their right to trial by jury, the various defendants also agreed to proceed with a simultaneous bench trial before Judges Feikens and Pratt in order to avoid the necessity of two separate trials involving identical proofs.

Although the proceedings in the two separate cases were conducted simultaneously, each judge was solely responsible for all rulings affecting each defendant in the case assigned to him, and each judge entered separate findings and conclusions regarding the guilt or innocence of each defendant in the case assigned to him.

At the conclusion of their joint bench trial, all appellants were found guilty on multiple counts and received sentences ranging from three years' imprisonment to twenty years' imprisonment.[1] Appellants Kilpatrick, James Weaver, Joseph Weaver, Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh, and Hurt were convicted on counts 1, 3, 4, and 6 through 16. Cara Woods was convicted on counts 8 and 9. And appellants Burns and Thompson were convicted on counts 2 and 5.

The simultaneous trial conducted in the district court was an understandable effort to accommodate indictments of the magnitude and complexity that were obtained here by the government. Nevertheless, this procedure has produced an appellate record of extraordinary size with the consequence that oral argument has been of less than usual assistance to us in analyzing and deciding the issues presented on appeal.

Instead of beginning our opinion with a narration of the facts, we shall consider the facts giving rise to each separate appellate issue in our discussion of it.

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[1] The following appellants were convicted and sentenced by Judge Pratt: Willie Lee Kilpatrick was convicted on counts 1, 3, 4, 6 through 16, and sentenced to concurrent terms of six years' imprisonment on each count, subject to the parole provisions of 18 U.S.C. § 4208(a) (2), with a special parole term of three years. In addition, the court imposed a $2,000 committed fine on count 1. James Reginald Weaver and Joseph Leon Weaver were convicted on counts 1, 3, 4, 6 through 16, and sentenced to concurrent terms of four years' imprisonment on each count, subject to the parole provisions of 18 U.S.C. § 4208 (a) (2), with a special parole term of three years. Cara Woods, Jr. was convicted on counts 8 and 9, and sentenced to concurrent terms of six years' imprisonment on each count under the parole provisions of 18 U.S.C. § 4208 (a) (2), with a special parole term of three years. The court also imposed a $1,000 committed fine on each count.

The remaining appellants were convicted and sentenced by Judge Feikens. Appellants Jackson, Brown, Blair, Bell, Riggs, Garrett, Horne, Jones, Rudolph, Cavanaugh, and Hurt were convicted on counts 1, 3, 4, 6 through 16, and received the following sentences. Eddie Jackson was sentenced to concurrent fifteen-year terms of imprisonment on counts 1, 3, 4, 6, 7, 8, 9, 10, 11, and 12, to be served

(continued on following page)

I. WERE DEFENDANTS PROPERLY INDICTED?

Appellants[2] challenge the validity of the indictments on several grounds. First, they contend that the grand

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(continued from preceding page)

consecutively with concurrent five-year terms of imprisonment imposed on each of counts 13 through 16, and a special three-year parole term. A committed fine of $5,000 on each count was also imposed. George Blair and Courtney Brown were sentenced to concurrent terms of fifteen years' imprisonment on each of counts 1, 3, 4, 6, 7, 8, 9, 10, 11, and 12, to be served consecutively with concurrent terms of 2½ years' imprisonment on each of counts 13 through 16, with a special three-year term of parole, and a committed fine of $5,000 on each count. Ronald Garrett received concurrent terms of 12½ years' imprisonment on each count, with a special parole term of three years and a committed fine of $3,000 on each count. Charles Rudolph and Herbert Bell received concurrent terms of ten years' imprisonment on each count, with a special parole term of three years, and a committed fine of $1,000 on each count. Samuel Eugene Horne, Alphonzo Jones, Charles Cavanaugh, and Leo Hurt were given concurrent terms of seven years' imprisonment on each count, with a special parole term of three years, and committed fines of $1,000 on each count. Fairh Lee Riggs was sentenced to concurrent terms of seven years' imprisonment on each count, with a special parole term of three years, both to be served concurrently with a sentence imposed by the district court for the Eastern District of New York, which Riggs was then serving.

Appellants Thompson and Burns were convicted on counts 2 and 5, and were sentenced as follows: Maurice Thompson received concurrent terms of five years' imprisonment on each count, with a special parole term of three years' imprisonment to be served at a federal facility with a drug abuse program. Laticia Burns received concurrent terms of three years' imprisonment on each count to be served at a federal facility having a drug abuse program, to be followed by a special three-year parole term.

[2] A number of separate briefs were filed on appeal. Unless otherwise noted, we will treat each argument as applicable to all appellants.

jury was improperly selected. Second, they contend that the information intercepted by the wiretaps was placed before the grand jury before the government complied with 18 U.S.C. § 2518 (10 (a). Third, they argue that the government misused the grand jury to intimidate persons whom the government intended to call later as witnesses in appellants' criminal trials. Finally, appellants urge that the indictments were multiplicitous.

A. The Selection of the Grand Jury.

Appellants argue that the selection of the grand jury venire violated the Jury Selection and Service Act of 1968, 28 U.S.C. § 1861 *et seq.*, as well as the selection plan adopted in the Eastern District of Michigan because an improper voting list was used, an unauthorized person took part in the compilation of the master jury wheel, and a jury clerk took official work out of the office of her home.

We decided these identical issues in *United States* v. *McNeal*, 490 F.2d 206 (6th Cir. 1973), *cert. denied*, 419 U.S. 1020 (1974). At the district court level, the parties in *McNeal* stipulated that precisely the same challenges to the grand jury venire had already been submitted to Judge Feikens and to Judge Pratt in the Kilpatrick and Jackson cases. The parties in *McNeal* agreed to be bound at the district court level by the rulings of Judge Pratt and Judge Feikens, and in accordance with their rulings, the district court denied the motion to quash the indictment in *McNeal*. On review we held that "there was no 'substantial failure to comply with the provisions' of the Act." 490 F.2d 207. We hold that our determination in *McNeal* is dispositive of these appeals as well, since not only the same issues but also the same facts giving rise to them are before us again.

B. The Presentation of Wire Interception Evidence Before the Grand Jury.

Immediately after their arrest, several appellants filed a motion to suppress the wiretap evidence that they believed might have formed a basis for their arrests. They also sought disclosure of the applications and orders for the interceptions. In addition, they moved to enjoin the government from holding a preliminary hearing or presenting the wiretap evidence to a grand jury until ten days after obtaining the disclosure they sought. The government opposed the motions, but neither admitted nor denied the legality of the wire interceptions. After hearing oral arguments, the district court held that the government could not present wire interception evidence at a preliminary hearing without disclosure, but otherwise the district court denied the motions.

On the day scheduled for the preliminary hearing, appellants were indicted by the grand jury, which heard the testimony of Special Agent Garibotto and evidence from the wire interceptions. The return of the indictments made it unnecessary to conduct the preliminary hearing.

Appellants contend that this procedure violated 18 U.S.C. § 2518 (9) and (10) (a) and 18 U.S.C. § 3504. Section 2518 (9) provides that:

> The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to

furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

Section 2518 (10) (a) provides:

> Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Finally, § 3504 states:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, or other authority of the United States—
>
> (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or

> because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act . . . .

Appellants contend that these sections authorized their motions to suppress, required the government to affirm or deny the legality of the wire interceptions, and prohibited the government from relying on the evidence gathered as a result of the interceptions until these requirements were satisfied. Accordingly, they contend that their indictments must be quashed because the government presented this evidence to the grand jury before it replied to their challenge to the interceptions. 18 U.S.C. § 2515 provides that no intercepted wire communication or evidence derived therefrom may be "received into evidence . . . in any . . . proceeding or before any . . . grand jury . . . if the disclosure of that information would be in violation of this chapter."

We hold that the government was not required to comply with § 2518 (9) or to affirm or deny the illegality of the interception before it could introduce the intercepted communications before the grand jury, nor were appellants entitled to prevent the presentation of this evidence to the grand jury even if the interception were unlawful.

The legislative history of § 2518 (9) demonstrates that Congress did not intend the ten-day disclosure requirement to apply to grand jury proceedings. The Senate Report section-by-section analysis provides that:

> "Proceeding" is intended to include all adversary type hearings. It would include a trial itself, a probation revocation proceeding, or a hearing on a motion for reduction of sentence. *It*

> *would not include a grand jury hearing*. Compare *Blue* v. *United States*, 86 S. Ct. 1416, 384 U.S. 251 (1966).

U.S. Code Cong. & Admin. News 2195 (1968).

The Congressional history of § 2518 (10)(a) demonstrates that this section was not intended to permit a defendant to challenge the evidence presented to the grand jury:

> Paragraph (10)(a) . . . . must be read in connection with sections 2515 and 2517, discussed above, which it limits. It provides the remedy for the right created by section 2515. *Because no person is a party as such to a grand jury proceeding the provision does not envision the making of a motion to suppress in the context of such a proceeding itself. Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual.* (*Blue* v. *United States*, 86 S.Ct. 1416, 384 U.S. 251 [1966].) *There is no intent to change this general rule*. It is the intent of the provision only that when a motion to suppress is granted in another context, its scope may include use in a future grand jury proceeding.

U.S. Code Cong. & Admin. News 2195 (1968). [Emphasis added.]

The Supreme Court's opinion in *Gelbard* v. *United States*, 408 U.S. 41 (1972) analyzes §§ 2518 (10) (a) and 3504, and supports the conclusion that they do not authorize a defendant to suppress evidence before the grand jury on the grounds that it was intercepted illegally. Nor is the government required to affirm or deny the legality of the interception. In *Gelbard* the Court held

that a grand jury witness could refuse to answer questions that were based upon illegal interceptions, and could defend against a contempt charge under 18 U.S.C. § 2515. Section 2515 bars the use as evidence before official bodies of the contents and the fruits of illegal interceptions. The Court held that in the context of § 3504, which states the procedures by which aggrieved persons may challenge illegally procured evidence, a "party aggrieved"

> *can only be a witness*, for there is no other "party" to a grand jury proceeding. Moreover, a "claim . . . that evidence is inadmissible" can only be a claim that the witness' potential testimony is inadmissible.

408 U.S. 54. [Emphasis added.]

The Supreme Court drew a careful distinction between a *witness* before the grand jury, who it held may refuse to answer questions based upon illegal interceptions, and a defendant or potential defendant. The Court held that:

> The congressional concern with the applicability of § 2518 (10) (a) in grand jury proceedings, so far as it is discernible from the Senate report, was apparently that defendants and potential defendants might be able to utilize suppression motions to impede the issuance of indictments: "Normally, there is no limitation on the character of evidence that may be presented to a grand jury, which is enforcible by an individual. [*United States* v. *Blue*, 384 U.S. 251 (1966).] There is no intent to change this general rule." S. Rep. No. 1097, 90th Cong., 2d Sess., 106 (1968). The "general rule," as illustrated in *Blue*, is that a defendant is not entitled to have his indictment dismissed before trial simply because the

> Government "acquire[d] incriminating evidence in violation of the [law]," even if the "tainted evidence was presented to the grand jury." 384 U.S., at 255 and n. 3; see *Lawn* v. *United States*, 355 U.S. 339 (1958); *Costello* v. *United States*, 350 U.S. 359 (1956). But that rule has nothing whatever to do with the situation of a grand jury witness who has refused to testify and attempts to defend a subsequent charge of contempt.

408 U.S. 59-60.

Accordingly, we hold that appellants were not entitled to contest the legality of the intercepted communications before the communications were submitted to the grand jury. Appellants contend, however, that they had a right to contest the admissibility of wiretap evidence at the scheduled preliminary hearing, and that the government could not deprive them of this right by the sudden tactic of obtaining an indictment.

Our court has repeatedly held that if "a grand jury returns a true bill prior to the time a preliminary hearing is held, the whole purpose and justification of the preliminary hearing has been satisfied." *United States* v. *Mulligan*, 520 F.2d 1327, 1329 (6th Cir. 1975). A defendant has no right to have a preliminary hearing if a grand jury indictment is returned. Although we have recognized that a preliminary hearing may as a practical matter provide a defendant with an irreplaceable opportunity for discovery, a defendant has no absolute right to these ancillary benefits. For example, in *Mulligan* we held that defendants, who wanted to cross-examine a key government witness prior to trial, suffered no prejudice when their preliminary hearing was continued

to permit the government to obtain a grand jury indictment in the interim. Accordingly, we hold that appellants suffered no *legal* prejudice when the government proceeded by indictment, rather than by a preliminary hearing at which appellants could have contested the legality of the wire interceptions pursuant to 18 U.S.C. §§ 2518 (10) (a) and 3504.

C. Improper Use of the Grand Jury.

Appellants also assert that the government improperly used the grand jury to discover and preserve evidence to be used at the trial of their already pending injitments. They assert that both Burt and Nabors were called before the grand jury to testify against appellants *after* appellants' indictment. The government concedes that it is improper to use a grand jury solely to prepare a pending indictment for trial. *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972); 8 Moore's Federal Practice ¶6.04. But it contends that the record contains no support for appellants' claim that Burt and Nabors were called only to prepare pending indictments for trial. Additionally, the government urges that appellants have not demonstrated that any prejudice resulted from the alleged misconduct, and it contends that only Nabors and Burt have standing to raise the issue.

A presumption of regularity attaches to a grand jury's proceedings and appellants have the burden of demonstrating that an irregularity occurred. *Universal Manufacturing Co.* v. *United States*, 508 F.2d 684 (8th Cir. 1975); *Beverly* v. *United States*, 468 F.2d 732 (5th Cir. 1972). Moreover, we agree with the observation made by the First Circuit that:

> grand jury proceedings cannot be policed in any detail. It is a price we pay for grand jury

> independence that sometimes people are indicted on the basis of evidence tainted in part by hearsay, Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), or of illegally obtained evidence, Lawn v. United States, 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). Nor is a grand jury narrowly confined in its objectives, Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906), Blair v. United States, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919).

United States v. *Doe*, 455 F.2d 1270, 1274 (1st Cir. 1972).[3] Accordingly, in *United States* v. *George*, 444 F.2d 310, 314 (6th Cir. 1971) we held that "[s]o long as it is not the sole or dominant purpose of the grand jury to discover facts relating to [a defendant's] pending indictment, the Court may not interfere with the grand jury's investigation."

Neither appellants nor the government have cited to us any portion of the record in which appellants presented this claim to the district court, and we have searched the voluminous record to no avail. However, assuming that

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[3] The court also recognized, however:

> On the other hand, we are sensitive to the possibilities of abuse of the grand jury process which are inherent in the present situation. As Moore has observed, "The government has at its disposal one of the most effective discovery mechanisms yet devised — the grand jury. This body may call witnesses under compulsory process and examine them in secret under oath, unhampered by the rules of evidence or an adversary counsel's cross-examination, or in the case of a 'prospective defendant' by Fifth Amendment immunity. [citations omitted]." 8 Moore's Federal Practice 16.08[1], at 16-100 (2d ed. 1970). 455 F.2d at 1275.

this issue is properly before us, we hold that appellants have presented nothing beyond their own unproved suspicions to prove that Burt and Nabors were improperly summoned before the grand jury for the sole or dominant purpose of preparing the pending indictments for trial. Portions of the testimony at trial suggest that after appellants were indicted, Burt and Nabors did testify before the grand jury regarding some of the matters at issue in appellants' trial. However, appellants have made no showing that Burt and Nabors were not called in order to determine whether other persons not yet indicted were also involved in the conspiracy under investigation. The indictments charged that appellants conspired with "divers other persons whose names are to the Grand Jury unknown," and the grand jury could properly call witnesses in an attempt to identify these persons. *United States* v. *Beverly, supra.*

D. Multiplicity.

Appellants allege that they were improperly indicted and convicted on five separate acts of possession with intent to distribute a controlled substance,[4] when the

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[4] The counts charged:

Count 12 — 659.66 grams of cocaine hydrochloride, with a strength of 15.8%.

Count 13 — 681.80 grams of heroin hydrochloride with a strength of 19.3%.

Count 14 — 45.30 grams of cocaine hydrochloride with a strength of 5.1%.

Count 15 — 14.66 grams of cocaine hydrochloride with a strength of 32.7%.

Count 16 — 2,589.93 grams of heroin hydrochloride with a strength of 58.1%.

proofs showed that all the narcotics in question were found at the Hubbell Street house, and that the intercepted wire communications indicated that appellants had just received a *single* shipment. Accordingly, appellants contend that the fragmentation into multiple counts of a single act of possession of narcotics violated their right to due process.

Apparently appellants raise this contention for the first time on appeal. The government contends that under F.R. Crim.P. 12(b) (2) appellants' failure to make the claim that the indictment was multiplicitous by pretrial motion constituted a waiver of this objection. F.R.Crim.P. 12(b) (2) requires that "[d]efenses and objections based on defects . . . in the indictment or information" "*must* be raised" prior to trial. (Emphasis added.) However, F.R.Crim.P. 12(f) also provides that the "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, *but the court for cause shown may grant relief from the waiver.*" (Emphasis added.)

Since it is not entirely clear from the general averments in the indictments that the narcotics referred to in counts 12 through 16 were all seized from the Hubbell Street house, there may have been good cause for appellants' failure to have raised this issue before the district court until the government presented its case. However, since appellants failed to present this objection to the district court even after the close of the government's case, when the factual basis of their objection under F.R. Crim. P. 12(f).

Appellants also argue that counts 6 and 10 and counts 7 and 11 are multiplicitous, because they charge both distribution and possession with intent to distribute the same quantities of drugs. They urge that possession with

intent to distribute is a lesser offense included within distribution. Again, it appears that appellants did not raise this contention before the trial court, and we hold, accordingly, that it was waived F.R. Crim. P. 12(f).

II. WAS THERE GOVERNMENT MISCONDUCT THAT REQUIRES REVERSAL?

Appellants contend that shocking governmental misconduct requires the reversal of their convictions. They contend first that a sham defendant was indicted in order to penetrate their defense. Second, they argue that before their trial, the government improperly disclosed critical information to the press. Third, they complain that the government improperly intruded into the marital relationship of appellant Blair and Ruth Ann Burt, to induce her to testify against appellants. Finally, they argue that the government improperly met with Burt and Blair without any notice to Blair's attorney.

A. The Sham Defendant.

Appellants contend that the government's misconduct in indicting Roosevelt Nabors as a "sham defendant" requires the reversal of their convictions. They contend that the sham nature of the indictment of Nabors, who served as a government informer, is shown by the fact that payments to him continued even after the indictment. Further, he was called to testify before the grand jury about the case in which he was charged after he had been indicted, and defense counsel Milton Henry, who had filed an appearance on behalf of Nabors as well as most of the other defendants, was not notified. Appellants argue that the sham indictment of Nabors violated the fundamental fairness guaranteed by the due process clause, and violated their right to counsel by introducing a government agent into the defense.

Nabors testified that when he first began working with the Bureau of Narcotics and Dangerous Drugs, (BNDD), he was told that his cooperation would be communicated to the court in connection with charges pending against him for attempted murder and the unlawful driving away of an automobile. He also stated that no other promises had been made to him. He stated that while he was working with the BNDD he was paid approximately $1,500 for living expenses. He testified that he was expected to help to set up arrangements so that government special agents could make purchases directly from members of the Jackson organization. He was not authorized by them to make purchases on his own. Nevertheless, he testified that without the knowledge or authorization of the government, he sold $600 worth of heroin that he had received from the Jackson organization on consignment. He said that when he was arrested, he was told that he was being prosecuted because of this independent transaction.

Agent Garibotto testified that during a review of tape recordings of the intercepted communications after the December 15 arrests at Hubbell Street, government agents discovered that, without government authority, Nabors had called and arranged to pick up at least one quantity of heroin, and that he had sold it. Garibotto testified that Nabors was indicted in good faith for this unauthorized part in the conspiracy. Although he had been severed from the other defendants before trial, Garibotto testified that the government retained the right to try him separately, and that at the time of the trial of the other defendants, no final decision had been made whether he would be brought to trial or not. He said that he planned to make no recommendations one way or the other. He stated that he had authorized a payment to Nabors after his testimony before the grand jury so that Nabors could stay out of sight in a motel. He said that

after the indictment he had not used Nabors again as an informant, but he believed that others in the BNDD might have done so.

Although appellants claim that Nabors was indicted in order to penetrate the defense and learn its tactics, they have presented little evidence that Nabors was involved in appellants' common defense. Although Attorney Milton Henry filed an appearance on behalf of Nabors as he did for all the other defendants, the court's records demonstrate that counsel was also assigned for Nabors on January 25, before he was called before the grand jury. Moreover, on the government's motion, Nabors' trial was severed from that of the other defendants on the ground that the government expected to call him as a witness. Nabors testified that when he was arrested, he did *not* meet all of the other defendants, talk to them, or know their names. He did recall that he spoke briefly to only one of the appellants, Kilpatrick.

We do not think that the record shows any government misconduct. Appellants have not sustained their burden of showing that Nabors, who was severed for trial, and for whom the district court appointed separate counsel shortly after his arrest, actually intruded into the attorney-client relationship between appellants and their counsel.

B. Pretrial Publicity Resulting from Governmental Disclosures.

Appellants make two contentions about pretrial publicity. First, they contend that the government improperly disclosed to the press information gathered by wire interceptions. Second, they contend that the volume of pretrial publicity made it impossible for them to receive a fair trial.

1. Pretrial Disclosure of Intercepted Communications.

Appellants strenuously contended both in the district court and in briefs and argument on appeal that the government made improper pretrial disclosures of critical information to the press. They urge that pretrial newspaper articles contained "detailed recitals of wire interceptions, which could only have been furnished by the government." The newspaper article principally relied upon to support this contention indicates on its face that its source was a "26-page affidavit [by] an agent of the Federal Bureau of Narcotics and Dangerous Drugs." Moreover, in their amended motion to dismiss for prosecutorial misconduct, appellants specifically argued that it was improper for the government to use information from wire interceptions in an affidavit for a search warrant, and "then place that affidavit in the custody of a court clerk, without first making provision for its protection from disclosure as required by the plain mandate of the Federal Law."

Thus we understand the gist of appellants' argument to be that the government had a duty to prevent unauthorized disclosures of their intercepted communications, and that the government's failure to prevent disclosure of the information recited in the affidavit requires the dismissal of the charges against them. Appellants rely upon 18 U.S.C. § 2517, which lists situations in which "[a]ny investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication" may disclose or use the information. Subsection (1) permits disclosure to another investigative or law enforcement officer to the extent necessary for the performance of both officers' official duties. Subsection (2) provides generally that

intercepted information and communications may be disclosed "to the extent . . . appropriate" to the officer's official duties. And subsection (3) permits disclosure where the officer is giving testimony under oath in a state or federal criminal or grand jury proceeding.[3]

Appellants contend that any disclosure not explicitly authorized by § 2517 is illegal, and they argue that § 2517 did not authorize either investigative or court personnel to disclose the contents of their intercepted communications to the press. Accordingly, they urge that the disclosure to the newspapers was illegal and that the only appropriate remedy is the dismissal of the indictments.

The government argues that subsection (2) authorized government agents to disclose the contents of intercepted communications in an affidavit for a search warrant. Then F.R. Crim. P. 41 (g) required the magistrate before whom the warrant was returned to file the warrant "and all other papers in connection therewith" with the clerk of the district court, where they became a matter of public record. The government argues that dismissal of the charges against appellants is not warranted merely because of the government's failure to take extraordinary measures to seek restriction of access to the court files,

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[3] Subsection (5) provides:

> Such contents and any evidence derived therefrom may be used under subsection (3) of this section when authorized or approved by a judge of competent jurisdiction where such judge finds a subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable.

especially when appellants made no request for such a restriction of access. The government notes that the wiretap statutes provide three remedies — suppression[6], civil damages,[7] and criminal penalties.[8] The remedies for unlawful *disclosure* of intercepted communications are civil damages and criminal penalties. The detailed provisions of the Act contain no provision for the dismissal of pending criminal charges.

We agree with the government that appellants have failed to demonstrate any circumstances that warrant dismissal of the charges against them. However, in view of the congressional intention to protect individual privacy, it would be better practice for the government to request, as a matter of course, that the district court restrict access to documents filed with the court that contain intercepted communications.

2. Pretrial Publicity and the Right to a Fair Trial.

Appellants also contend that the pretrial publicity about their cases was so pervasive and inflammatory that they could not receive a fair trial. However, appellants were tried not by a jury, but by experienced district judges. In these circumstances appellants must show that the pretrial publicity resulted in some actual prejudice, and they have failed to do so. Moreover, if appellants believed that one or both of the district judges could not try them impartially, the remedy was to seek disqualification. 28 U.S.C. § 144.

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[6] 18 U.S.C. § 2515.

[7] 18 U.S.C. § 2520.

[8] 18 U.S.C. § 2511.

C. Interference with George Blair's Marriage to Ruth Ann Burt.

Appellant George Blair contends that in violation of the public policy that protects marriage, government agents intentionally broke up his marriage with Ruth Ann Burt in order to procure her testimony as a government witness. He contends that the convictions of all the appellants rest in large part on Burt's tainted testimony, and should be reversed.

Blair first presented this objection to the district court in a post-trial affidavit in support of his motion for a new trial. Blair did not testify at trial, nor did he present any witnesses who testified that the government "alienated" his marriage to Burt. The district court held that:

> there was no credible evidence indicating any improper conduct on the part of the government; rather the credible evidence, including testimony of defendant's former wife, Ruth Ann Burt, indicated the government did not act improperly.

We hold that the record adequately supports the trial court's finding, which is not clearly erroneous.

D. The Government's Meeting with Blair and Burt.

Both before the district court and on appeal, appellants argue that the government improperly met with appellant George Blair and his then wife Ruth Ann Burt without the presence of, or even notification to, Blair's attorney. Appellants urge that the meeting in the absence of counsel was fundamentally unfair. Moreover, since this was a complex conspiracy case, and Blair's statements could be used to incriminate other defendants found to be

co-conspirators, appellants argue that the meeting violated the right to counsel of all of the appellants. In support of their contentions appellants cite *State* v. *Britton*, 203 S.E.2d 462 (W. Va. 1974) as authority for reversing a conviction when the prosecution met with a defendant in the absence of his attorney. The contend that the circumstances of the secret meeting with Blair and Burt "irremediably tainted" her testimony.

According to Burt's testimony,[9] about five months after Blair's arrest, when she and Blair were not living together, Agent Garibotto communicated with her about testifying before the grand jury, and she said that she would think about it. Later she called Garibotto and arranged to meet him, telling him that she would bring Blair. When they met, she said that she wanted to negotiate immunity for Blair, and Garibotto replied that he would have to consult the government attorney handling the case. The critical meeting was held at the Ramada Inn. Blair, Burt, Garibotto, and government attorney Wampler were all present. Burt stated that no one took notes, and she did not believe that the conversation was recorded. She did not recall whether anyone gave Blair the *Miranda* warnings. In Blair's presence she told the government agents a good deal about her knowledge of the narcotics organization and Blair's activities. When she was asked if Blair took part in the conversation, she said, "in some areas, yes." She stated that he answered some questions. Burt said that she then asked if Blair could be given immunity in return for her testimony, but that they were told that Blair would not be given immunity unless he testified himself.

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[9] Blair did not testify at the trial.

At the time of the meeting, Blair and virtually all of those indicted were being represented by one attorney, Milton Henry. The government did not inform Henry of the meeting, nor was Blair asked to contact Henry himself.

The district court conducted an inquiry into this matter at a post-trial hearing. Government attorney Wampler testified that he had believed that it was Blair's wish that neither his co-defendants nor their common counsel learn of his efforts to obtain immunity in return for Burt's testimony. Moreover, he stated that Blair said little at the meeting, and that the government "didn't rely on anything that was said at the meeting and that's very true."

The trial court held that the government "offered no evidence at trial resulting from any statements made by Miss Burt or defendant Blair at the meeting .... [C]learly the testimony of Miss Burt at trial was in no way the fruit of the Ramada Inn discussion." The court recognized the dangers of meeting with a defendant without his counsel, especially when co-defendants are represented by the same counsel, but it held that in this case the contact with Blair was not "improper." The meeting was sought by Burt and not by the government, and it was arranged with Burt, not Blair, who made only "gratuitous" comments that were not used at trial.

We agree with the district court. We are satisfied with the district court's careful inquiry to determine whether any evidence derived from the meeting was used by the government, and with its conclusion that no evidence presented at trial was gained from the meeting. Accordingly, any error committed by the government was harmless whether measured by the ordinary or by the constitutional standard.

Of course, as a general matter, an attorney should not communicate directly with a party whom he knows to be represented by an attorney without the consent of the lawyer. *See* American Bar Association Code of Professional Responsibility, Canon 7, D.R. 7-104(a)(1). Here, however, the meeting was arranged primarily between government agents and Burt, who was not under indictment. The government did not seek the meeting. *Arrington* v. *Maxwell*, 409 F.2d 849 (6th Cir. 1969). Government attorney Wampler testified that he believed that Blair particularly wanted to keep his attempts to secure immunity from the other defendants and the counsel who represented them all jointly. *Cf. Arrington, supra*. However, the government did not take the precautions that were possible. It did not encourage or even suggest to Blair that he should either notify Henry or arrange for the appointment of independent counsel who could be present. Although we disapprove of this practice, it bears little resemblance to the outrageous prosecutorial conduct which required reversal in cases cited by appellants. *E.g., United States* v. *Rispo*, 460 F. 2d 965 (3rd Cir. 1972).

III. DID THE DISTRICT COURT ERR IN ADMITTING CHALLENGED EVIDENCE?

Appellants also seek to overturn their convictions on the basis of several rulings by the district court admitting challenged evidence. They contend that the wiretap evidence that figured so prominently in the prosecution's case was inadmissible, first because the government's application was not properly authorized, and also because the application did not meet several statutory requirements. Appellants seek the suppression of the

evidence seized at the Hubbell Street house, and from appellants Jones, Hurt, and Woods at the time of their arrests, on Fourth Amendment grounds. Appellants contend that voice exemplars that they were required to give were inadmissible on both Fourt and Fifth Amendment grounds. And finally, they contend that the testimony of Agent Garibotto identifying the voices on the tapes was inadmissible because it was the fruit of informal "aural showups" which violated appellants' Fourth, Fifth, and Sixth Amendment rights.

A. Wiretap Evidence.

The intercepted communications were critical items of proof in the government's case, and appellants contend that the district court erred in refusing to suppress the evidence seized by the interception. They challenge the validity of the authorization for the government's application for a wiretap order.[10] They also argue that the application did not demonstrate that normal investigative procedures would have been inadequate, nor did it afford the district judge probable cause to believe that the telephone to be tapped was being used or was about to be used for one of the offenses specificed in the wiretap statute.

1. The Authorization for the Application for the Wiretap Order.

Appellants argue that the wiretap evidence should have been suppressed because the government's application

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[10] Appellants' challenge applies both to the original application and to the application for the extension. Our discussion applies to both as well.

for the interception order lacked the authorization required by the statute. 18 U.S.C. § 2516(1) provides that:

> The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for . . . an order authorizing or approving the interception of wire or oral communications. . . .

In this case, the written application and the application for an extension stated that Attorney General Mitchell had specially designated *Acting* Assistant Attorney General Henry Peterson to authorize the application to the federal court, and Peterson's letter was attached.

After their indictment, appellants moved to suppress the wiretap evidence on the ground that an *acting* assistant attorney general had no authority to authorize wiretaps pursuant to § 2516. Appellants argue that the applications were insufficient on their face. Section 2518 (10)(ii) provides that the contents of intercepted communications may be suppressed on the ground that "the order of authorization or approval under which it was intercepted is insufficient on its face."

In *United States* v. *Vigi*, 515 F.2d 290 (6th Cir.), *cert. denied*, 432 U.S. 912 (1975), our court considered this argument and held that it was unnecessary to determine whether an *acting* assistant attorney general who signed the letter authorizing the application could give effective approval under § 2516, because the Attorney General himself had actually approved the application. *Accord*, *United States* v. *Swann*, 526 F.2d 147 (9th Cir. 1975); *United States* v. *Acon*, 513 F.2d 513 (3d Cir. 1975);

United States v. *Robertson*, 504 F.2d 289 (5th Cir. 1974), *cert. denied*, 421 U.S. 913 (1975). The same situation is present in this case. The district court found that Peterson had submitted the papers supporting the request for authorization to Attorney General Mitchell, and that Mitchell himself approved the application. The government submitted the affidavit of Sol Lindenbaum who stated that the Attorney General had approved the request for 'authorization to apply for wiretap orders. Attached to this affidavit were copies of a memorandum from Mitchell to Peterson. In his deposition Lindenbaum identified the handwritten initials on the memos as Mitchell's. Judge Kennedy, who issued the wiretap orders, was told that Mitchell had approved the application. Appellants also contend, however, that Attorney General Mitchell's internal memoranda were ineffective because 28 C.F.R. § 0.180 required the designation of formal orders. Appellants contend that this section is applicable by its own terms to all documents relating to "the assignment . . . or delegations of authority, functions, or duties by the Attorney General." These documents are to be designated as formal "orders" to be issued by the Attorney General in a numbered series. This section is not applicable to delegations of the special authority over applications for interception orders, or to the Attorney General's personal approval of an application for an interception order. Other courts have found verbal approval by the Attorney General to be sufficient. *United States* v. *Falcone*, 505 F.2d 478 (3d Cir. 1974), *cert. denied*, 420 U.S. 955 (1975).

Appellants also contend that the affidavit in support of the application for the wiretap failed to make the averments required by 18 U.S.C. § 2518 (1) (c). Section 2518 (1) (c) requires that an application for an electronic

surveillance order contain a "complete statement as to whether or not other investigative procedures have been tried and failed or why they appear to be unlikely to succeed if tried or to be too dangerous. . . ." We hold that the affidavit of Agent Garibotto was a satisfactory statement of the investigative steps taken to date, and that it affords a sufficient reason why normal investigative procedures "appear to be unlikely to succeed."[11]

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[11] Agent Garibotto's affidavit stated in part:

> 19. Normal investigative procedures have not succeeded in establishing the full extent of the activities of Eddie Jackson and George Blair relating to their purchase or sale of controlled substances, nor has Eddie Jackson's and George Blair's source of supply been identified or established. Based on my knowledge and experience as a Special Agent of the Federal Bureau of Narcotics and Dangerous Drugs, and the experience of Supervisory Agents and other Special Agents of the Bureau of Narcotics and Dangerous Drugs, normal investigative procedures reasonably appear to be unlikely to succed in establishing the identities of Eddie Jackson's and George Blair's co-conspirators, aiders and abettors, their places of operation for their transportation of controlled substances to the Detroit, Michigan area and for their manufacture and distribution of controlled substances within the Detroit, Michigan area, and their times, places, schemes and manners for selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances. My experience and the experience of other Federal Agents has shown that narcotics (controlled substance) raids and searches have not, in the past, resulted in obtaining evidence of who the raided violator's co-conspirators, aiders and abettors were, and where their places of operation were to transport controlled substances into an area or manufacture or distribute controlled substances about an area. Experience has shown that controlled substance manufacturers and distributors do not keep records of their controlled substance actions. It is the experienced belief of Special Agents of Region VI that additional surveillances of Jackson's and

(continued on following page)

However, appellants argue that the averments were false and misleading because a government informant, Roosevelt Nabors, had been asked to become a lieutenant in the organization, but had refused on the advice of government agents. This opportunity for infiltration, they argue, would have permitted the government to investigate the organization by normal procedures. The affidavit did not discuss the invitation for Nabors to become a lieutenant. The district judge rejected this argument because, even as a lieutenant, Nabors would have had difficulty in learning all the complex details of the widespread organization, and its aiders and abettors. Moreover, in view of Nabors' lengthy prior criminal record, the government would have had great difficulty in establishing criminal liability by his testimony alone.

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> Blair's and his operation, if continued on a regular basis, will jeopardize the outcome of the investigation and will do little to reveal the manufacture and distribution network. Jackson and Blair are extremely surveillance conscious and have two men on duty outside 19315 Hubbell to spot surveillance units. Special Agent Smith has been unable to move any further vertically or horizontally in the Jackson/Blair operation because of Jackson's and Blair's extreme caution. S-1 does not personally know anymore facts concerning the Jackson/Blair operation.
>
> 20. For the reasons set out hereinabove, all normal avenues of investigation are closed, and it is my belief that the only reasonable way to develop the necessary evidence to discover the other persons involved in the Jackson/Blair manufacture and distribution of controlled substances network, and their locations and schemes of operation, is to intercept wire communications from the telephone utilized by Eddie Jackson and George Blair located in the premises at 19315 Hubbell, Detroit, Michigan, and carrying telephone number 313-864-4854, which has been, is being, and is about to be used by Eddie Jackson, George Blair and others yet unknown, in connection with the commission of the above-described offense.

We agree with the district court's analysis. The availability of an informant who was offered and declined an opportunity to penetrate deeper into a criminal organization under investigation did not render insufficient Garibotto's statements of the need for wiretaps to discover and prove the liability of the conspirators. *See United States* v. *Pacheco*, 489 F.2d 554, 564-565, *cert. denied*, 421 U.S. 909 (1975).

Appellants' final contention regarding the wire interception is that the affidavit submitted with the application for the wiretap order did not meet the requirement of 18 U.S.C. §2518(3) (d) that it afford the district court "probable cause for the belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of [an offense specified] . . . ." Appellants contend that the application failed to establish probable cause to believe that the telephone in the house on Hubbell Street was being, or was about to be, used to facilitate the distribution of narcotics.

The affidavit recited that on two separate occasions, on October 22 and November 4, a government informant, who consented to having government agents monitor his conversation, called the number registered to the Hubbell Street address and set up a sale at the Hubbell Street house, and the purchased substance was tested and found to be heroin. During the exchange, the agent observed the telephone ring a number of times. He saw appellants Blair and Brown answer the calls. Additionally, Garibotto averred that based upon his experience in narcotics investigations, a telephone was regularly used to

negotiate the time, place, and manner of "selling, buying, possessing, concealing, delivering, distributing, or paying for controlled substances."

On review, we must view the affidavit in a common sense fashion, and we think that it afforded probable cause to believe that the telephone at the Hubbell Street address was being used to make the arrangements for a series of narcotics transactions. This is sufficient to satisfy the requirement of § 2518(3) (d).

2. The Arrests of Appellants Jones, Hurt, and Woods.

We next consider the legality of the arrests of appellants Jones, Hurt, and Woods as they left Hubbell Street on the night of December 15. Appellants argue that the government lacked probable cause to make these arrests, and that the evidence seized at the time of the arrests must be suppressed. Earlier in the evening of the night of the arrests, the agents monitoring the Hubbel Street telephone tap overheard conversations indicating that an expected shipment of narcotics had arrived. Accordingly, a large number of government agents took up surveillance posts near the Hubbell Street house and arrested appellants as they left the structure.

The government intercepted a call from Joe Weaver to appellant Jones about 9 p.m. Weaver told Jones that "Courtney [Brown] wants to see you." Garibotto was informed of this call, and he instructed Agent Smelter that Jones was a close associate of Jackson, and that he should be arrested as he left Hubbell Street.

Agent Dockery testified that he actually arrested Jones. There was no evidence that Dockery knew that Garibotto had identified Jones as a close associate of Jackson's who should be arrested. Dockery testified that when he arrested Jones, he knew that the wire interception indicated that a large shipment of narcotics was

concealed at 19315 Hubbell Street, that Weaver had called Jones and told him that Courtney wanted to see him, and that Jones was identified by another agent when he arrived at Hubbell Street. Dockery testified that based on their knowledge of the large quantity of narcotics hidden on the premises, he and the other agents had conferred and determined that anyone seen entering and then leaving 19315 Hubbell would be stopped and searched "on the probable cause that they would be carrying narcotics." He observed Jones' car pull up to the house, and saw its two passengers enter 19315 Hubbell. They departed about five minutes later. Dockery followed them for a short distance, then arrested them. A search revealed that Jones had concealed four cellophane bags containing about one pound of heroin each inside his shirt at the waistband. The evidence of the 1,924.5 grams of heroin was the basis for counts 6 and 10, distribution and possession without intent to distribute heroin.

Agents also intercepted a call from Blair to appellant Hurt on December 15. Blair stated that the heroin was on hand. Hurt wanted a kilogram, and he was told that he would have to pay cash. Hurt asked the price, and Blair stated that he would call him back. Garibotto was informed of the call, and he stated that Hurt was a substantial customer, and if he came he should be arrested as he left.

Hurt was arrested by Agent Cigich, who testified that "supervisory agents" told him to maintain surveillance at Hubbell Street, and

> should any individual that had arrived at that address get back into their [sic] vehicles and depart, to apprehend and place under arrest the individual.

Hurt arrived and entered 19315 Hubbell. When he departed, Agent Cigich followed and arrested him some distance away. Cigich testified that he found a small packet of white powder "inside the car, lying on the floor next to the driver's front seat." The powder was tested and found to be .268 grams of heroin. Apparently Hurt was the driver and only person in the car at the time of the arrest. The heroin was offered into evidence in support of appellants' convictions on counts 7 and 11, possession and possession with intent to distribute .268 grams of heroin.

There was testimony that agents observed Woods arrive at 19315 Hubbell at about 9:40, and leave a few minutes later. He was arrested by Agent Goldenbaum. Goldenbaum testified that he had been informed by agents monitoring the wiretaps that a narcotics shipment had arrived at Hubbell Street and was being rapidly distributed. He was told to get into a radio car and take up a surveillance position. He learned that at about 9:30 two persons had been arrested leaving the premises, and were found to have suspected narcotics in their possession. At about 9:40, he was informed by radio that a 1969 Chrysler was parked in front of the Hubbell Street house, and he was told to follow it when it left and to arrest appellant Woods. A package containing 37.66 grams of cocaine and 137.5 grams of heroin was found in the pocket of his jacket. Additionally agents seized $4,809 in cash and a pistol. This evidence was the basis of counts 8 and 9 charging distributing the heroin and cocaine, and supported the conspiracy charge.

The district court upheld each of these arrests. The court held that it was reasonable for the arresting officers to assume that the Jones who was identified arriving at Hubbell Street was the Jones who had called earlier and

whom Garibotto had ordered arrested. The court held that although no one actually identified Hurt prior to his arrest, "the officers had enough facts to determine that the man they arrested was Leo Hurt, Jr., and *probably* he was violating federal narcotics statutes." Although there was no intercepted telephone call to Woods, the district court held that the agents had probable cause because they knew that the Hubbell Street house was being used as a distribution site for narcotics on the night of December 15. The court reasoned that it was extremely unlikely that a person would come to the distribution center on that night except for the purpose of illegal narcotics trafficking. Moreover, the agents knew that it was common practice in the narcotics trade to dispense a shipment quickly. Accordingly, when they saw Woods arrive and depart after only a few minutes — just as Jones and Hurt had done a few minutes earlier — they had probable cause to believe that Woods, too, would have narcotics in his possession when he left.

Neither Garibotto's knowledge about Jones and Hurt nor his orders for their arrest can be relied upon to provide probable cause for their arrests, because there was no evidence that any of his comments had been communicated to the agents on the scene who actually made or ordered their arrests.

The government contends that the information known to a superior officer may be imputed to the arresting officer, *citing United States* v. *Trabucco*, 424 F.2d 1311, 1315 (5th Cir. 1970), *cert. denied*, 399 U.S. 918 (1970), and that the collective knowledge of agents working as a team is to be considered together in determining probable cause. *E.g.*, *United States* v. *Caniesco*, 470 F.2d 1224, 1230 n. 7 (2d Cir. 1972); *United States* v. *Stratton*, 453 F.2d 36 (8th Cir. 1972), *cert. denied*, 405 U.S. 1069 (1972). When a superior officer orders another officer to

make an arrest, it is proper to consider the superior's knowledge in determining whether there was probable cause. Likewise, when a group of agents in close communication with one another determines that it is proper to arrest an individual, the knowledge of the group that made the decision may be considered in determining probable cause, not just the knowledge of the individual officer who physically effected the arrest. But here, in contrast, because there was no evidence that Garibotto's order to arrest either Jones or Hurt was the basis of their arrests, his knowledge cannot be considered in determining probable cause. On the other hand, we do mutally impute the knowledge of all the agents working together on the scene and in communication with each other. Therefore it was proper to consider not only the facts known to Agent Goldenbaum when he arrested Woods, but also the information known to the officers who saw Woods visit 19315 Hubbell and ordered Goldenbaum to follow and arrest him.

When Dockery arrested Jones, he knew that Jones had received a call from the Hubbell Street telephone that evening, that narcotics were believed to be concealed on the premises, and that the person he saw enter and leave the premises was known to another agent on the scene as Alphonzo Jones. Dockery testified that he had conferred with the other agents on the scene and determined that anyone who visited 19315 Hubbell Street was likely to be carrying narcotics when he left. The district court's discussion of Woods' arrest indicates that it determined that the agents on the scene knew that 19315 was being used as a narcotics distribution center that evening, and we assume that Dockery learned as much from his conference with the other agents.

These facts are sufficient to afford probable cause to believe that Jones had been trafficking in heroin. Of course if the government had offered evidence that the agents on the scene were aware of Jones' close association with Jackson at the time of the arrest, this additional evidence would have strengthened the probable cause. Mere presence at a place where the government believes illegal drugs will be distributed will not provide probable cause for an arrest on narcotics charges. *See Sibron* v. *New York*, 392 U.S. 40 (1968). But here we think that the agent who made the arrest did have reason to believe that it was more likely than not that Jones was in possession of narcotics when he left 19315 Hubbell. 19315 was a story-and-one-half bungalow, and agents knew that it was used as a headquarters and distribution site for narcotics. They also knew that a large shipment of narcotics had arrived. Since Dockery had a conference with the other agents, and knew of the call to Jones, we think that it is legitimate to assume that he knew that the wiretap indicated that the shipment was to be distributed to callers *that evening*. In this circumstance, as the district court reasoned in connection with Woods, it was more likely than not that a visitor on the night of December 15 was there to pick up narcotics, especially when he had been called earlier that night from the Hubbell Street address. Accordingly, the arrest was lawful and the evidence seized from Jones was properly admitted.

In the case of the appellant Hurt, the same reasoning applies. Agent Cigich testified that he made the arrest because of a general order by his supervisors to arrest anyone leaving 19315 Hubbell that evening. Although the government did not prove that the call from Blair to Hurt negotiating the sale of a kilogram had been communicated to Cigich or to the other agents on the scene, we assume

that the supervisory agents who gave these orders knew of the anticipated distribution from the Hubbell Street house *that evening*. As in the case of appellant Jones, there was probable cause to arrest Hurt immediately after his brief visit to the house. The totality of the circumstances suggested no reason for his presence other than to engage in narcotics traffic.

In the case of appellant Woods, moreover, the agents had more than simply the expectation that 19315 Hubbell was to serve as a distribution site that evening. They also knew that two other persons who had arrived shortly before Woods had been arrested and were found to have suspected narcotics in their possession. Additionally, as the district court noted, the agents knew that once a narcotics shipment arrives, it is distributed very quickly. In these circumstances, we agree with the district court that the facts known to the officers who ordered the arrest of Woods, and of which they had reasonably trustworthy information, " 'were sufficient to warrant a prudent man in the belief that [Woods] had committed or was committing an offense.' " *Adams* v. *Williams*, 407 U.S. 143, 148 (1972), *quoting Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

Accordingly, we hold that the evidence seized at the arrests of appellants Hurt, Jones, and Woods was legally seized, and was admissible to prove their guilt. Since we find that there was probable cause for the arrest of Cara Woods, the evidence seized at the time of the arrest was admissible, and we have no occasion to consider whether the statements he later made were independent of his arrest.

B. The Evidence Seized from the Hubbell Street Premises.

A large quantity of narcotics was seized from the house on Hubbell Street on December 15, shortly after the arrest of appellants Jackson, Brown, Blair, and Joseph and Reginald Weaver. Appellants contend that these arrests were purposely delayed until appellants were inside the Hubbell Street house, and that they were used as a pretext for making a search of the premises without a warrant.

The arrests were made at approximately 10 p.m. on December 15. According to the testimony at the suppression hearing, about 6 p.m. that evening, government agents who were monitoring the Hubbell Street wiretaps informed Agent Garibotto that several calls suggested that a long awaited shipment of narcotics had arrived. Garibotto testified that he and government attorneys immediately began to prepare affidavits in support of a search warrant for Hubbell Street. Since these calls also indicated to Garibotto that buyers had arranged to come to Hubbell Street, he ordered the agents in the Hubbell Street vicinity to be alerted for the buyers' arrival. At approximately 9:45 Garibotto, who was on the way to the home of a district judge to present the affidavits, was notified of the arrests of Jones, Hurt, and Woods as they left Hubbell Street. He was also told that each of them was found to be in possession of narcotics when arrested. At that time Garibotto ordered the agents on the scene to arrest Jackson and the others found in the Hubbell Street house. At approximately 10 p.m. at the home of the district judge, when he was notified that the arrests had been made, and that suspected narcotics had been found in plain view, he added this information to the affidavit. The district judge

issued a search warrant for the house on Hubbell Street, and a full search was made pursuant thereto. A large quantity of narcotics was found and was later introduced into evidence at appellants' trial.

Appellants contend that Garibotto purposely ordered the arrests to be made at the Hubbell Street house as a subterfuge to permit a search of the premises without a warrant. Garibotto denied that he delayed the arrests for that reason. Both appellants and the government rely upon Garibotto's statement of his purpose for ordering the arrests at that time. He testified:

> Well, the circumstances at the Hubbell address mandated that the arrest be made at that time. Our forces were diffused at the time. We knew there were a great number of customers heading to the Hubbell address to purchase heroin and cocaine. We made three arrests, there were three seizures. We knew that our forces were spread around the immediate vicinity. We were just concerned that the evidence that was on hand at Hubbell would be distributed to the streets and would not be seized.

The district court upheld the seizure of the challenged evidence on two grounds. First, it held that

> [d]espite substantial testimony about the arrests themselves at Hubbell, no persuasive facts were presented to support defendants' allegation that Jackson could have been arrested prior to his entering the house on Hubbell.

Additionally the court held that even assuming that the agents had improperly delayed the arrests to gain entry into the house without a warrant, the search that was later conducted pursuant to a warrant was not tainted.

The court reasoned that the district judge, who received lengthy affidavits prepared *before* the arrests (to which only one handwritten paragraph had been added *after* the arrests), had before her sufficient unchallenged facts to afford probable cause for a search. The improper addition could therefore be ignored.

Our court has repeatedly made it clear that:

> An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment. If, in fact, the primary purpose of forcibly entering a person's home is to search for evidence with which to convict him of crime, the evidence so obtained is not admissible in court.

United States v. *Harris*, 321 F.2d 739, 741 (6th Cir. 1963), *quoted in United States* v. *Carriger*, No. 74-1901 (6th Cir. 1976, decided and filed, August 25, 1976) [Footnote omitted]. As Chief Judge Cecil stated in *Harris*,

> The real purpose of the agents must be determined from all of the facts and circumstances surrounding the arrest of the defendant and the search of his apartment. The court is not bound to accept the purpose as stated by the agents as controlling.

321 F.2d 741.

Appellants argue that probable cause to arrest Jackson, Brown, and Blair existed after the October 22 and November 4 sales to the undercover agent. Moreover, they emphasize that Jackson was under government surveillance before he arrived at Hubbell Street, but he

was not arrested until *after* he was on the premises. They argue that Garibotto's statement quoted above admits that his purpose in ordering the arrests was to permit the warrantless search and seizure of narcotics.

Although the district court did not focus on the issue as stated in *Harris*, its determination that the defendants did not prove that Jackson could have been arrested sooner implies that the government did *not* make the arrests as a pretext for a warrantless search. The arrests were ordered as soon as the buyers who had called earlier left the premises, were arrested, and were found to be in possession of narcotics. Taken with the reports of the outgoing calls from Hubbell setting up additional sales, this firmly established that the narcotics shipment had arrived, and that the occupants of the house were distributing it rapidly. This knowledge afforded probable cause to arrest all the occupants of the house, not just Jackson. Moreover, we think that Garibotto's testimony indicates that there was real concern for preventing the unlawful distribution of a large shipment of narcotics to other purchasers, as well as a desire to effect the arrests while there was sufficient manpower available. The record does not indicate that the government was trying to avoid getting a warrant to search Hubbell Street. In fact, when Garibotto ordered the arrests he was on his way to the home of a district judge with detailed affidavits, and he added only a brief handwritten statement after he learned of the arrests. The district judge actually issued a warrant within minutes of the entry and arrests. No search of the premises was made until the warrant was issued.

The facts and circumstances surrounding the arrests thus demonstrate that the government did not manipulate the arrests in order to avoid the Fourth Amendment warrant requirement, and we hold that the evidence seized from Hubbell Street was properly admitted.

C. Formal Voice Exemplars.

Appellants contend that the district court's order requiring them to give formal voice exemplars violated their privilege against self-incrimination and constituted an illegal search and seizure. Accordingly, they argue that neither the exemplars nor identification testimony based upon the exemplars was admissible. In *United States* v. *Franks*, 511 F.2d 25, 33 (6th Cir.), *cert. denied*, 422 U.S. 1042 (1975) we rejected these arguments, holding:

> Mitchell and Britton claim that the court order compelling them to give voice exemplars violated their constitutional right against unreasonable searches and seizures and their constitutional privilege against self-incrimination. United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), established that compelling voiceprints even of the same words used in the crime does not violate the constitutional privilege against self-incrimination. Accord, United States v. Rogers, 475 F.2d 821, 825-826 (7th Cir. 1973). Moreover, compelling a voiceprint is neither a "search" nor a "seizure." *Dionisio*, 410 U.S. at 14-15, 93 S.Ct. 764. We reject Mitchell's attempt to limit *Dionisio* to the grand jury context in that, so long as the underlying seizure of the person is proper, requiring that person to submit voice exemplars violates no constitutional right. See United States v. Rogers, 475 F.2d 821 (7th Cir. 1973) (court-ordered submission); United States v. Sanders, 477 F.2d 112 (5th Cir.), cert. denied, 414 U.S. 870, 94 S.Ct. 88, 38 L.Ed.2d 88 (1973) (legally in custody on another matter).

D. Informal "Aural Show Ups."

Appellants also contend that their Fourth Amendment rights and their privilege against self-incrimination were violated, and their Sixth Amendment right to counsel denied, at a series of informal "aural show ups." Appellants allege that government agents created opportunities to speak to each of the appellants both in person after their arrests, and later over the telephone by setting up a lengthy procedure for the return of their seized property. Agents testified that they did not give the warnings detailed in *Miranda* v. *Arizona*, 386 U.S. 436 (1966) when they spoke to appellants on these occasions,[12] and appellants did not have their counsel present.

As we stated in connection with the formal voice exemplars, *supra*, neither the Fourth Amendment nor the privilege against self-incrimination is violated by the disclosure, even if compelled, of a person's voice. Appellants' complaint is not that their statements were used to incriminate them in a testimonial sense, but that the agents were able to recognize their voices on the tapes after having heard them in person and over the telephone.

Appellants also claim, however, that because the "aural show ups" formed the basis for the critical testimony identifying their voices on the tapes, they were critical stages at which the Sixth Amendment guaranteed appellants' right to counsel. A review of the testimony indicates that Agent Garibotto did speak to several of appellants briefly after their arrests, and later over the telephone. These conversations appear to have been brief and matter of fact, concerning such routine matters as the return of property which had been seized. There is no requirement that counsel be present for conversations about such routine matters when r effort at interrogation is made.

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[12] Appellants do not contend that they were not given their *Miranda* warnings before formal custodial interrogations.

IV. WAS THERE SUFFICIENT PROOF OF APPELLANTS' GUILT ON EACH OF THE COUNTS?

Next we consider the sufficiency of the proofs supporting appellants' convictions on the various counts of the indictment. First, appellants assert that the *Pinkerton* rule should not be applied to convict defendants, found to be conspirators, of each of the substantive counts without proof that each defendant actually took part in the individual transactions. Second, several appellants challenge the sufficiency of the evidence linking them to the conspiracy. Last, we will consider challenges to the proofs on counts 3, 4, 8 and 9.

A. The Pinkerton Rule

Appellants vigorously attack the validity of the rule announced in *Pinkerton* v. *United States*, 328 U.S. 640 (1946) that even if he did no more than join a conspiracy, a conspirator can be convicted of any substantive offense committed in furtherance of the conspiracy and as a part of it. Appellants contend that the *Pinkerton* rule is bad law, and that this court should not follow it. Our court, however, is constitutionally required to follow the Supreme Court's decision in *Pinkerton* and the cases following it, which have never been overruled, or even questioned by the Supreme Court.

B. The Sufficiency of the Evidence of Conspiracy.

Appellants Kilpatrick, Riggs, Rudolph, Cavanaugh, Horne, Hurt, and Garrett challenge the sufficiency of the evidence supporting their convictions. Since each of them was found guilty of conspiracy, count 1, under the *Pinkerton* rule, they could also be convicted of counts 3 and 4 and counts 6 through 16, which charged crimes that

were part of and in furtherance of the conspiracy. Appellants contend, however, that there was insuffcient evidence to support their convictions on the conspiracy charge.

In reviewing the sufficiency of the proof of appellants' guilt, we will be guided by the following general principles. The evidence will be viewed in the light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60 (1942). Moreover, there are special evidentiary rules applicable to conspiracy cases. As we stated in *United States* v. *Mayes*, 512 F.2d 637, 651 (6th Cir.), *cert. denied*, 422 U.S. 1008 (1975):

> a prima facie case of the conspiracy and the defendant's connection with it must be established by evidence independent of that offered as an admission of a co-conspirator. . . . However, a prima facie case is less than proof beyond a reasonable doubt; indeed, it is less than a preponderance. . . . Moreover, the prima facie case need not be established before the proffered hearsay may be admitted; the judge may admit it conditionally. It is sufficient if at the close of the government's proofs, a prima facie case of conspiracy and the defendant's connection with it has been established by "independent or disassociated evidence."

Applying these principles, we turn to the evidence that is claimed to support the finding that each of these appellants were conspirators.

Willie Lee Kilpatrick

Appellant Kilpatrick was convicted of conspiracy, count 1, by Judge Pratt, and under the *Pinkerton* rule he was also convicted on counts 3, 4, and 6 through 16. We

hold that the evidence was adequate to support his conviction on the conspiracy count, and we have already discussed the *Pinkerton* rule *supra*. The following evidence supported the district court's conclusion that Kilpatrick "was involved in narcotic trafficking, was clearly associated with defendant Jackson and connected with the other conspirators . . . [and] was in the 'lieutenant' echelon of the Jackson organization. . . ." Kilpatrick flew to New York with appellant Riggs (Jackson's girlfriend), who was arrested carrying a quantity of narcotics when she attempted to return to Detroit. Informant Nabors testified that he observed Kilpatrick at 19315 Hubbell Street at the time scheduled for a meeting of the Jackson organization lieutenants. When Nabors refused the organization's invitation to become a lieutenant, he was not allowed to stay. A search of Kilpatrick's apartment produced substances used to dilute heroin, narcotics paraphernalia, and firearms. Kilpatrick's address book listed the names of other conspirators, and he was likewise found listed in their books.

Leo Hurt

Judge Feikens convicted appellant Hurt on count 1 because he found beyond a reasonable doubt that Hurt purchased from the Jackson organization large quantities of narcotics for wholesale distribution. The district court took special note of a call that Hurt made by Blair in which Hurt stated that his customers were complaining about the quality of the narcotics he had sold them. Judge Feikens observed that Hurt was mentioned in the telephone and address books of several of the conspirators. Finally, Hurt was called to the Hubbell Street house on December 15 when the large shipment was being distributed, and he was arrested with heroin in his possession when he left. Although the heroin was

found in Hurt's car, not on his person, there was ample evidence to support a finding of possession, since he was apparently the only person in the car, and the heroin was found on the floor by the driver's seat. This evidence is sufficient to support the conclusion that Hurt, like Cavanaugh and Rudolph, was a major distributor for and a member of the conspiracy. Accordingly, we affirm Hurt's conviction on count 1. Under the *Pinkerton* rule, the conviction on count 1 permitted his conviction on the counts charging the substantive crimes committed in furtherance of the conspiracy as well, including count 7. Accordingly, we need not discuss Hurt's argument that there was insufficient evidence to convict him on count 7, although we conclude that even without the *Pinkerton* rule, there was sufficient evidence to sustain his conviction on this charge.

Hurt also contends, relying upon *Kotteakos* v. *United States*, 328 U.S. 750 (1946), that the evidence shows only a "hub and spoke" cluster of several conspiracies, each between an individual dealer and the "hub" consisting of Jackson and his lieutenants. In *Kotteakos*, however, defendant Brown specialized in obtaining loans from the Federal Housing Administration by false and fraudulent applications. Several defendants, each of whom had obtained such a loan falsely and fraudulently, were charged with and convicted of a single all-encompassing conspiracy. The Supreme Court held that there was proof, not of a single, but of several conspiracies, and reversed the convictions.

Hurt, however, was a distributor with an ongoing relationship with the conspiracy to distribute illegal narcotics. He depended for his success upon the continuing vitality of the entire conspiracy. This is particularly true in the narcotics business, because new customers of each seller may become, by reason of addiction, a lifetime potential market for all other sellers.

Fairh Lee Riggs

Judge Feikens convicted appellant Riggs of conspiracy, count 1, concluding that she knowingly and intentionally joined the conspiracy, and that she was "an important courier in the transportation of narcotics" as well as "an intimate associate of Jackson." We hold that the evidence was sufficient to convict Riggs of conspiracy. Riggs had travelled to New York with appellant Kilpatrick and defendant Reynolds in September 1971. All three used assumed names. When airlines personnel examined appellant Riggs' carry-on luggage, they observed an estimated $30,000 in cash in a paper bag. Riggs was arrested later that day when she returned to the New York airport for a return flight to Detroit. Her luggage contained 1,917 grams of heroin and almost $5,000 in cash. She was convicted of possession of the heroin in the Eastern District of New York, and the conviction was affirmed. *United States* v. *Riggs*, 474 F.2d 699 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). By stipulation, the record in the New York case was incorporated into these proceedings. Riggs was Jackson's girlfriend. He arranged to take calls from another conspirator at her house. Riggs' name and telephone number, along with those of several other appellants, were found in appellant Rudolph's address book. This evidence was adequate to establish a prima facie case that appellant Riggs knowingly joined the conspiracy. Accordingly, other evidence of hearsay statements by other conspirators was admissible to strengthen the case against Riggs. Burt's testimony indicated that the Jackson organization procured several large shipments of narcotics from a source in New York. Additionally Jackson told Burt that he believed the Riggs arrest must have been a "set-up" because the two men with her were not arrested. Jackson tried to raise a large sum because his "old lady" was in jail in New York, and Blair told Burt that Jackson was trying to find a lawyer for Riggs. This evidence amply supports the conviction of Riggs on count 1.

Samuel (Eugene) Horne

Judge Feikens concluded that it was "clear beyond a reasonable doubt that defendant Samuel Horne knowingly and intentionally joined the conspiracy." He concluded that Horne's "principal activity" for the organization was "wholesale distribution of narcotics." The government intercepted telephone conferences between Horne and Joseph Weaver, Brown, Blair, and Jackson. In particular, Judge Feikens noted that on December 9 Horne called Jackson and attempted to arrange a sale to a customer who wanted a "full thing" for $15,000. This evidence was more than ample to support Horne's conviction of conspiracy.

Charles Cavanaugh

Judge Feikens convicted Cavanaugh of count 1, conspiracy, holding that he was one of the organization's "wholesale distributors," and that he "engaged in other kinds of supply activity for the group." Burt testified that she and Blair delivered cocaine to Cavanaugh in exchange for three outfits of clothing. The wiretap intercepted a number of calls from Cavanaugh to the Hubbell Street telephone inquiring about the availability of narcotics. Cavanaugh indicated his familiarity with various key members of the organization by calling and asking to speak to "George [Blair], Brown, or the big man [Jackson]." In these calls Cavanaugh made arrangements for sales, complained about the quality of the narcotics that he had received, saying at one point that he had had to return his customers' money. On December 14 Jackson agreed to sell Cavanaugh 13 quarters of heroin.

This evidence was more than sufficient to prove Cavanaugh's part in the conspiracy. *See, e.g., United States* v. *Tramunti*, 513 F.2d 1087, 1112 (2d Cir.); *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Varelli*, 407 F.2d 735, 748 (7th Cir. 1969), *cert. denied, sub nom. Saletko* v. *United States*, 405 U.S. 1040 (1972); *United States* v. *Aviles*, 274 F.2d 179, 188 (2d Cir. 1960).

Charles Rudolph

Judge Feikens also convicted appellant Rudolph on the conspiracy count. He held that Rudolph was "deeply involved in wholesale distribution of drugs for the group." Judge Feikens cited as evidence Rudolph's telephone calls, his account records, and his automatic telephone dialing cards for other conspirators, as well as the fact that Rudolph was listed in the telephone and address books of other conspirators. In one telephone call, Rudolph told Brown he was "getting low," and he would take a quantity of narcotics being held for another buyer if that transaction did not go through. Brown called Rudolph a few days before the last big delivery to tell him that the narcotics would be around in a few days, and Rudolph said that he would wait. An outgoing call to Rudolph's telephone was made from Hubbell Street on December 15 when the expected shipment was being distributed, but there was no answer. A search of appellant's home yielded 417 grams of heroin, common diluents, guns, ammunition, and a record book including the names of other conspirators and sums of money. This evidence established a prima facie showing of his status as a conspirator, and made admissible Burt's testimony that Blair told her Rudolph had once been a Jackson lieutenant, but that he "broke away" and now specialized in selling "quarters" of heroin and cocaine. It is immaterial that Rudolph no longer served the Jackson organization as a lieutenant, since he still acted as a major distributor for the organization. The evidence adequately supports his conviction.

Ronald Garrett

Judge Feikens found appellant Garrett guilty of conspiracy on the basis of the following evidence: Garrett's telephone number was listed in Kilpatrick's address book and in Rudolph's telephone and address book, and he had a substantial account listed in Rudolph's account book. Additionally, Garrett figured prominently in a number of intercepted telephone conversations. Since Garrett was not one of the speakers in these conversations, they are admissible to prove the truth of the matters asserted only if a prima facie case is made that Garrett was one of the conspirators. However, Judge Feikens properly relied upon the fact that several of the conspirators mentioned Garrett repeatedly in the course of discussions regarding their narcotics transactions. Evidence that his name was mentioned repeatedly in the context of the narcotics transactions was not hearsay, and was competent evidence tending to show that he was a conspirator. It should be unnecessary to emphasize that proof of an illegal conspiracy is seldom direct. More often, there is only indirect proof of the unlawful agreement. We are required by *Glasser* to view the evidence in the light most favorable to the government. Accordingly, we hold that a prima facie case of conspiracy, although a minimal one, is established by the evidence of the telephone calls, considered together with the address books and Rudolph's account book, which indicated a substantial sum of money for Garrett, as well as for other persons shown to be conspirators. Accordingly, the substance of the telephone conversations, in which other conspirators' statements indicated Garrett's deep involvement, was admissible. In addition, Burt's hearsay testimony that she helped Blair make a delivery which he said was for "Five-O" was admissible to prove Garrett's complicity. Burt identified Garrett as "Five-O" at trial. This evidence was adequate to support Garrett's conviction on count 1.

C. Counts 3 and 4

Appellants Brown, Bell, Riggs, Horne, Garrett, Jones, and Rudolph challenge the sufficiency of the evidence to support their convictions of count 3, the October 22 sale to Special Agent Smith, and of count 4, the November 4 sale. Since we have affirmed their convictions of conspiracy under count 1, appellants were properly convicted of the substantive charges in these counts as well under the *Pinkerton* rule.

D. Counts 8 and 9

Appellants challenge the validity of convicting them on count 8 (distribution of 137.35 grams of heroin) and count 9 (distribution of 37.66 grams of cocaine) in view of the fact that the district court acquitted Cara Woods, in whose possession the heroin and cocaine were found, of the conspiracy charge. Appellants contend that since Woods was not a member of the conspiracy, his statement to Agent Garibotto regarding the source of the narcotics was hearsay and therefore not admissible to prove the guilt of the conspirators. Accordingly, they argue that there was no proof that Woods had obtained the narcotics from 19315 Hubbell. We disagree. There was compelling circumstantial evidence that the heroin and cocaine referred to in counts 8 and 9 were procured from the Jackson organization at 19315 Hubbell. Woods visited the Hubbell Street address briefly on the night of the 15th of December when a large shipment of narcotics was being rapidly distributed, and when he was arrested just as he left he was found in possession of the narcotics. Minutes before two other persons had entered briefly, and when they left they too had been arrested and were found to be in possession of narcotics. We think that this is ample evidence to support a finding that the narcotics seized from Cara Woods were distributed by the Jackson organization, and that therefore all of the conspirators could be convicted of counts 8 and 9 under the *Pinkerton* rule.

V. WERE BLAIR AND HURT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL?

Appellant Blair argues that although the two defense attorneys who represented all defendants at the trial were very well qualified, he did not receive effective assistance of counsel because of the inherent conflict of interest between their representation of Jackson, the "kingpin" or "boss," and that of minor defendants such as Blair. He argues that he did not even have a fee-paying relationship with the defense attorneys, who were primarily concerned with Jackson. He also contends that conflict arose between himself and other defendants when proof was introduced about his secret efforts to secure immunity in return for the testimony of Ruth Ann Burt.

However, the record reveals that in open court, Blair declined the tendered option of having his case severed from that of the other defendants, with separate counsel appointed to represent him. Blair was not present in the courtroom for the first five days of trial, and the district court granted the government's motion to sever him. On the sixth day, however, Blair appeared in court, and counsel for all of the defendants stated that Blair still wished to be tried with the other defendants. Blair was questioned both by defense counsel and by the court about his willingness to waive his right to be present for the first days of the trial. He waived that right, his right to trial by jury, and agreed to the simultaneous bench trial. He was also questioned as follows:

> Mr. Rothblatt: And you also understand on this indictment Mr. Henry and I represent a number of other defendants, as well as yourself, and it's been suggested there is a possibility there may be some confliction, because we represent

> some of the other defendants; we may not be representing you as effectively as we might be, since we represent other defendants. Now, you understand you have a right to any other attorney represent you, and if you can't afford a lawyer, the Court will assign a lawyer to you free of charge; do you understand that?
>
> Mr. Blair: Yes.
>
> Mr. Rothblatt: And you agree that Mr. Henry and I and Mr. Halpern will continue with your representation, along with the other defendants in this case?
>
> Mr. Blair: Yes.

Blair first made a claim of ineffective assistance of counsel in a motion for a new trial. The district court held that mere dissension or hostility between defendants does not render their representation by the same counsel inadequate. The court observed that Blair's request to be tried with the other defendants could be treated as a waiver of this objection. Finally, the court determined that his

> allegation that his counsel had difficulty keeping his defense at heart is totally without support in the record. It shows that defendant expressly chose his counsel after the court explained his right to be represented by an attorney of his choice and that the attorney chosen ably represented him at all stages of the trial.

The Sixth Amendment guarantees the right to counsel in criminal proceedings, and a conflict of interest on the part of counsel representing two defendants may deprive the accused of the effective assistance of counsel. *Glasser* v. *United States*, 315 U.S. 60 (1942). However, the mere fact of joint representation does not *per se*

establish a denial of the effective assistance of counsel. *United States* v. *Wayman*, 510 F.2d 1020, 1025 (5th Cir. 1975), *cert. denied*, — U.S. — (19—). Our court requires a party claiming that joint representation resulted in a conflict of interest to demonstrate that some actual prejudice resulted to him. *United States* v. *Burkeen*, 355 F.2d 241, 244 (6th Cir.), *cert. denied sub. nom. Matlock* v. *United States*, 384 U.S. 957 (1966); *United States* v. *Cale*, 418 F.2d 897 (6th Cir. 1969), *cert. denied*, 397 U.S. 1015 (1970).

Here appellant identified two grounds of conflict. First, he argues that he was only a minor party, and that counsel was concerned primarily with the "kingpin"* of the organization. The record does not bear this argument out. Blair was shown to be one of Jackson's primary aides, or lieutenants, not just a minor figure. Moreover, the district court found, and we agree, that counsel ably represented Blair. Second, Blair contends that the disclosure of his secret attempts to gain immunity drove a wedge between him and the other defendants. Although some of the other defendants may have had reason to feel that Blair had acted disloyally to *them* in a personal sense, he has not demonstrated that his hostility affected counsels' ability to continue joint representation. Blair's defense was not shown to be inconsistent with that of Jackson or the other co-defendants. All, for example, were equally eager to discredit the testimony of Burt, Blair's former wife. We find no actual conflict of interest preventing adequate representation of appellant Blair. Moreover, it would be especially inappropriate for us to infer prejudice from the mere fact of joint representation where, as was the case here, the defendant was advised of the possibility of a conflict of interest, and of his right to sever his case and be represented by separate appointed counsel.

Petitioner Hurt also attacks the adequacy of his representation by counsel. Compared to appellant Blair, Hurt was a lesser figure in the conspiracy. Nevertheless, Hurt has not carried his burden of proving the existence of a conflict of interests between himself and the more important conspirators that resulted in actual prejudice to him. He had more than minimal contacts with the conspiracy, and repeatedly obtained narcotics for distribution.

Hurt concedes that counsel succeeded in securing acquittal for some defendants. He argues that because the trial court concluded that the evidence against him was "not as overwhelming" as against the other convicted defendants, truly adequate representation would have secured acquittal. But the trial court's conclusion is equally consistent with adequacy of representation insofar as it indicates, that, unlike most other defendants, Hurt's defense was almost successful.

VI. WERE THE SENTENCES IMPOSED BY JUDGE FEIKENS IMPROPER?

Appellants' final contention is that the sentences imposed by Judge Feikens on the defendants tried before him were improper because they were imposed in deference to community sentiments, and to deter future violators without regard to the "militating" [sic mitigating?] factors in the individual cases. They also contend that the sentences imposed by Judge Feikens were harsher than those imposed by Judge Pratt for identical conduct.

It is well settled that except in the most exceptional circumstances, an appellate court will not disturb a sentence that is within the limits set by statute. The severity of a sentence is normally committed to the discretion of the trial court. *See Dorszynski* v. *United*

States, 418 U.S. 424, 440-441 (1974); *United States* v. *Phillips*, 510 F.2d 134 (6th Cir. 1975). Appellants do not contend and cannot demonstrate that the sentences imposed by Judge Feikens exceeded the maximum limits permitted by statute. Instead, they contend that the sentences were not set with proper regard for the individual circumstances of each defendant, and that they should have been more compatible with those imposed by Judge Pratt. The record, however, indicates that Judge Feikens did take the individual circumstances of the defendants and the enormity of their offenses into consideration in determining the proper sentences, and we find no abuse of his discretion.

VII. CONCLUSION.

We have determined that the contentions which we have not treated above do not require discussion. We also observe that it is indeed rare for a lengthy trial not to produce some errors, and this unusual proceeding is no exception to the general rule. In some cases, the cumulative weight of a large number of errors otherwise inconsequential in isolation might render a proceeding unfair. We have examined this record with that possibility in mind and have concluded that in spite of minor errors, this was a fair trial for all appellants.

For the foregoing reasons, the judgments of conviction are AFFIRMED.

APPENDIX D

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

(Supreme Court of the United States)

(No. A-390)

Leo Hurt, Petitioner, v. United States

Upon consideration of the application of counsel for petitioner, it is ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended and including December 7, 1976.

/s/ Potter Stewart
Associate Justice of the Supreme Court of the United States

Dated this 10th day of November, 1976.